The Standing of Environmental Objectives in the Assessment of Fiscal State Aid Under Article 107(1) TFEU

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Tiivistelmä – Referat – Abstract

Toimet ilmastonmuutoksen hillitsemiseksi ja siihen sopeutumiseksi ovat Euroopan unionin (EU) politiikan keskiössä. EU:n ilmasto- ja energiapaketin mukaisesti EU:n kasvihuonekaasupäästöjä on vähennettävä vähintään 40 prosenttia vuoteen 2030 mennessä verrattuna vuoteen 1990, ja EU:n pidemmän aikavälin tavoite on olla ilmastoneutraali vuoteen 2050 mennessä. Yleistason tavoitteiden lisäksi kutakin jäsenvaltiota koskevat sitovat päästövähennysvelvoitteet. Koska valtiontuki on yksi keskeisimmistä keinoista edistää näiden tavoitteiden saavuttamista, on tärkeää, että Euroopan unionin toiminnasta tehdyn sopimuksen (SEUT) 107(1) artiklan mukaisen kielletyn valtiontuen arviointi on linjassa jäsenvaltioita sitovien velvoitteiden kanssa. Valtiontukisääntelyn tulisi tarjota jäsenvaltioiden viranomaisille tarkoituksenmukaiset puitteet, jotka tukevat ympäristötavoitteiden saavuttamista tehokkaalla tavalla. Tämä tutkielma käsittelee ympäristötavoitteiden asemaa SEUT 107(1) artiklan mukaisen kielletyn verotuen arvioinnissa ja valtiontukea valikoivan ympäristöverotuksen ja ympäristöverojen alennuksen tai vapautuksen muodossa.

Tutkielman viitekehys on siten EU:n vero- ympäristö- ja valtiontukipolitiikan risteyskohdassa. Verotus kuuluu lähtökohtaisesti jäsenvaltioiden yksinomaiseen toimivaltaan, jota on kuitenkin käytettävä EU:n perussopimusten mukaisesti. Kilpailusääntöjen vahvistaminen taas kuuluu EU:n yksinomaiseen toimivaltaan, minkä johdosta jäsenvaltioiden on ilmoitettava SEUT 108(3) artiklan mukaisesti komissiolle kaikki toimet, jotka voivat pitää sisällään SEUT 107(1) artiklassa tarkoitettua kiellettyä valtiontukea. Kielletty valtiontuki tarkoittaa julkisista varoista myönnetty tukea, joka antaa tuensaajalle valikoivaa taloudellista etua sekä vääristää tai uhkaa vääristää kilpailua ja vaikuttaa jäsenvaltioiden väliseen kauppaan. Kaikkien tunnusmerkkien on täytyttävä samanaikaisesti, jotta kyseessä on kielletty tukitoimi. Verotuen osalta keskeisin tunnusmerkki on tuen valikoivuus, jonka arvioinnissa sovelletaan niin sanottua kolmivaiheista testiä (”*three-step test*”). Oikeudellisessa kirjallisuudessa on havaittu, että verotukien arviointi on tiukentunut viime vuosina, minkä seurauksena suuri osa komissiolle ilmoitetuista kansallisista toimista on katsottu kielletyksi verotueksi. Näin ollen useat verotoimet käyvät läpi arvioinnin sekä SEUT 107(1) että SEUT 107(3) artiklan alla, jonka mukaisesti kielletyksi todettua tukitoimea voidaan pitää sisämarkkinoille soveltuvana, mikäli sen myönteinen vaikutus yleisen edun mukaisen tavoitteen saavuttamiseen ylittää sen mahdolliset kielteiset vaikutukset kauppaan ja kilpailuun. Tilanne on ongelmallinen paitsi siksi, että se rajoittaa jäsenvaltioille perussopimusten mukaan kuuluvaa päätäntävaltaa verotuksellisissa asioissa, myös siksi, että siitä aiheutuu merkittävä hallinnollinen taakka sekä jäsenvaltioiden että komission viranomaisille. Ennen kaikkea on pohdittava, onko ympäristötoimien tiukka valtiontukikontrolli tarkoituksenmukainen vallitsevien sitovien päästövähennysvelvoitteiden valossa.

Ympäristöä koskevien tavoitteiden asema kielletyn verotuen arvioinnissa on perinteisesti ollut hyvin rajallinen, sillä Euroopan unionin tuomioistuimen vakiintuneen tulkintakäytännön mukaan kielletyn valtiontuen arvioinnissa ei tule huomioida toimenpiteen tarkoitusta tai muotoa, vaan ainoastaan sen vaikutus sisämarkkinoiden toimintaan. Tutkielmassa tarkastellaan sitä, pitäisikö vaikutuksiin keskittyvästä arvioinnista joustaa erityisesti verotuen valikoivuuden arvioinnissa, eli tulisiko tuen ympäristötavoitteilla olla merkittävämpi rooli SEUT 107(1) artiklan tulkinnassa. Kysymykseen vastaaminen edellyttää myös yleistason pohdintaa siitä, tulisiko ympäristöoikeuden vaatimuksia ylipäätään huomioida valtiontukioikeudessa, vai tulisiko eri oikeudenaloja arvioida toisistaan erillisinä kokonaisuuksina. Tässä yhteydessä pohditaan erityisesti SEUT 11 artiklan läpäisyperiaatteen soveltamisalaa ja mahdollista merkitystä kunkin kielletyn valtiontuen tunnusmerkin arvioinnissa. Tutkielmassa kuvataan, miten ympäristöverotoimia arvioidaan Euroopan unionin tuomioistuimen ja komission viimeisimmässä ratkaisukäytännössä, sekä esitetään monipuolisesti vaihtoehtoisia arviointitapoja, joiden perusteella useampi toimi voisi välttää luokittelun kielletyksi valtiontukitoimeksi ympäristötavoitteidensa takia. Painopiste on valikoivuuden kolmivaiheisen testin arvioinnissa ja erityisesti siinä, miten jäsenvaltiossa sovellettava yleinen verojärjestelmä tulisi määrittää ja miten siitä poikkeamista tulisi arvioida sen tavoiteltuun päämäärään nähden.

Avainsanat – Nyckelord – Keywords
Euroopan unioni, kielletty valtiontuki, verotuki, ympäristöverotus, ilmastopolitiikka, veropolitiikka, kilpailuoikeus, ympäristöoikeus, valikoivuus

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ABBREVIATIONS

AG	Advocate General
CJEU	Court of Justice of the European Union, comprising of both the European Court of Justice and the General Court
ECJ	European Court of Justice
EEAG	Guidelines on State aid for environmental protection and energy 2014-2020
ETD	Directive 2003/96/EC on the taxation of energy products and electricity
ETS	Emissions Trading System
EU	European Union
GBER	Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty
GC	General Court
i.e.	For example
MBI	Market-based Instruments
OJ	Official Journal
PPP	Polluter Pays Principle
SGEI	Services of General Economic Interest
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

1.1. Background

The aim of mitigating climate change and adopting to its detrimental effects is in the frontline of the politics of the European Union (EU). Therefore, the EU has introduced legislation along with several policy commitments which oblige both the EU and the Member States to address the ongoing climate crisis by adhering to binding emissions reduction targets, in particular those laid down in the 2030 climate and energy framework.[1] The framework is enforced by legislation such as the Effort Sharing Regulation 2018/842/EU and Regulation 2018/1999/EU, according to which Member States must develop National Energy and Climate Plans and contribute to the target of at least a 40 % domestic reduction in economy-wide greenhouse gas emissions by 2030 compared to 1990[2], although it is expected that the Commission presents a plan to increase the targets to 50% or even 55%.[3] Furthermore, the objective of the European Green Deal, the priority of the von der Leyen Commission, is to create "*a […] competitive economy where there are no net emissions of greenhouse gases in 2050*.[4]" The attainment of these ambitious goals necessitates the reconciliation of long-term policy goals with the prevailing political realities as well as balancing between the often-opposing objectives of environmental, social, fiscal and economic policies. It is undisputed that the transition to a green economy requires State intervention both in the form of regulation and market-based instruments (MBI) such as environmental taxes.[5]

In fact, State spending has been on the increase during the recent years, and about 55% of all spending (66.5 billion EUR) was allocated to environmental protection and energy savings in year 2018.[6] Hence, State aid law, which determines the justified means of State intervention in the normal functioning of the market, plays a paramount role in the field of environmental policy. The main rule of State aid control is that measures fulfilling the cumulative criteria laid down in Article 107(1) of the Treaty on the Functioning of the

[1] Communication from the Commission, *A policy framework for climate and energy in the period from 2020 to 2030*, COM(2014) 15 final. See also EEAG recital 4.
[2] See, inter alia, Regulation 2018/1999/EU, recital 7, Article 1(a) and 15(2), Regulation 2018/842/EU, recitals 1-3, Article 1 and 4.
[3] Communication from the Commission, *The European Green Deal*, COM(2019) 640 final, p. 4.
[4] Ibid, p. 2.
[5] EEA Report No 17/2016, *Environmental taxation and EU environmental policies*, 2016, p. 5, 36.
[6] State Aid Scoreboard 2019, p. 11-13, 38.

European Union (TFEU) are in principle prohibited, as they are considered to have distortive effects on competition and trade between the Member States. However, such measures may be exempted from the prohibition if they are considered compatible with the internal market under Article 107(2) or Article 107(3) TFEU.

The focus of this dissertation is in the assessment of the cumulative criteria in the case of environmental taxes and exemptions therefrom with the aim of clarifying when they may fall outside the scope of State aid control under Article 107(1) TFEU and thus also the notification obligation laid down in Article 108(3) TFEU. The objective is to study the standing of environmental objectives in the interpretation of Article 107(1) TFEU by the Court of Justice of the European Union (CJEU) and the Commission. One important issue with this respect is the question of whether environmental considerations should be better integrated into the assessment existence of State aid in the light of the requirements stemming from EU law and policy as well as the case-law of the CJEU. This question is also linked with the assessment of the desired scope of State aid control and whether it allows the Member States to pursue their emission reduction targets in a sufficiently efficient manner. Answering these questions requires studying the compatibility of the three frameworks – fiscal, environmental and State aid law – and the leeway Member States enjoy in the design of fiscal measures pursuing an environmental objective. Several legal scholars have discussed the need for an adjustment of the current State aid regime to better support the attainment of the EU's energy and climate change objectives, and discussion on alternative interpretations of the notion of prohibited State aid under Article 107(1) TFEU with this respect will be discussed throughout this dissertation.

The notion of material selectivity will be discussed in detail as it raises several interpretative difficulties and issues of legal uncertainty with respect to the assessment of fiscal aid measures.[7] As State aid in the form of tax measures is widely utilised by the Member States for the pursuit of public policy objectives such as those relating to the environment, the notion of State aid has arguably been stretched in order to ensure that they remain subject to State aid control.[8] The focus on the permissibility of environmental taxes and exemptions therefrom is not only topical both also interesting from an academic point due to the inconsistencies in interpretation and the fact that the reconciliation of EU-wide State aid control

[7] See, for instance, Merola, 2016, p. 533.
[8] Ibid, p. 534, 356.

and national fiscal policies of the Member States links with the division of competences between EU and the Member States.[9]

1.2. Research questions and delimitations

As mentioned above, this dissertation studies the categorisation national fiscal measures as State aid under the cumulative criteria laid down in Article 107(1) TFEU and aims to clarify when State intervention may and perhaps should fall outside State aid control when it pursues an environmental objective. By doing so, it aims at systemising the prevailing case-law of the CJEU and identifying the types of national fiscal measures aimed at the protection of the environment which may escape State aid control or, alternatively, may be considered compatible with the internal market regardless of being classified as prohibited State aid under Article 107(1) TFEU. However, the compatibility assessment under Article 107(3) TFEU will not be subject to a throughout review, as the guidance for its application is relatively detailed and will soon be updated.[10] A review of EU secondary legislation related to environmental taxation[11] will not be undertaken, either.

In addition to providing a general overview of the standing of environmental objectives in State aid judgements, a more detailed study on the utilisation of aid in the field of environmental taxation will be undertaken. Fiscal State aid may be the result of an asymmetrical definition or application of an environmental tax, as imposing a tax on some undertakings only may provide a selective advantage to undertakings which are excluded from its scope although being in a comparable factual and legal situation in the light of the objective pursued. Furthermore, State aid may be present in the form of reductions in or exemptions from environmental taxes, which by their nature provide an advantage to certain undertakings by relieving from the applicable tax. The focus is on the interpretation of the Treaty articles, although the Guidelines on State aid for environmental protection and energy 2014-2020 (EEAG) will also be considered as they play a significant role by identifying a series of

[9] See, for instance, Peters, 2019.
[10] In this regard, see Communication from the Commission concerning the prolongation and the amendments of, inter alia, the Guidelines on State Aid for Environmental Protection and Energy 2014-2020, OJ C 224, 8.7.2020, p. 2–4.
[11] Such as Directive 2008/118/EC concerning the general arrangements for excise duty and Directive 2006/112/EC on the common system of value added tax.

environmental measures compatible with the internal market under Article 107(3)(c) TFEU.[12]

Another question of this dissertation is, as explained above, whether the current State aid regime should be adjusted to better address the changes in the field of environmental law and policy. In this connection, especially the role of integration principle laid down in Article 11 TFEU in the assessment of the cumulative criteria of Article 107(1) TFEU will be discussed. Finally, this dissertation aims to clarify the competences of the Member States in the pursuit of environmental objectives by means of taxation in particular. The underlying tension is balancing between the Member States' freedom to pursue their legitimate regulatory policies and the protection of the State aid regime and the objectives it pursues. In the end, the scope of State aid control is a question of constitutional balance between the competences of the EU and the Member States.[13] Therefore, the research questions of this dissertation may be listed as follows:

1) May and should environmental objectives play a role in EU State aid law?
2) What is the current standing of environmental objectives in the assessment of the cumulative criteria for fiscal State aid under Article 107(1) TFEU?
3) What types of measures in the field of environmental taxation may escape classification as prohibited State aid?
4) Should the interpretation of the cumulative criteria be altered to better respect the integration principle laid down in Article 11 TFEU and the binding emission reduction targets imposed on Member States?

Shedding light on these questions should enable a better understanding of the range of measures which Member States may use to address environmental issues under the current State aid framework, and put together the various arguments of legal scholars for and against a revision of the prevailing effects-based approach, according to which the objectives of the measure in question may only be taken into account *after* the assessment under Article 107(1) TFEU in the justification stage under Article 107(3) TFEU.[14] Increasing the price of environmentally harmful activity or products via taxes or, alternatively, decreasing the price

[12] EEAG, para. 1.2.(18) and recital 10.
[13] De Cecco, 2013, p. 115-116.
[14] See, for instance, Wiesbrock, 2015, p. 78-80.

of environmentally friendly action or products by means of tax advantages, are amongst the most commonly used national measures in the field of environmental protection[15] due to which these clarifications bear practical importance.

This dissertation will not focus on the practical application of the notification obligation laid down in Article 108(3) TFEU. However, the discussion on when the cumulative criteria are met in effect relates to the question of whether the measure in question must be notified, the significance of which should not be undermined, as the notification and the following assessment procedure place an administrative burden on both the Member States and the Commission. The General Block Exemption Regulation 651/2014/EU (GBER) and the "de minimis" Regulation 1407/2013/EU will be excluded from a throughout examination, although their role is briefly explained. The interpretation of Article 106 TFEU concerning services of general economic interest (SGEI) will likewise be only briefly discussed. Due to the limited space, the assessment of State aid in the field of public procurement as well as the application of the EU Emissions Trading System (ETS) will be excluded altogether.

The study begins by looking into the integration of EU competition law and environmental policies – what, if any, role should environmental considerations play in State aid law? In this chapter, different views on competition policy as well as arguments for and against integration will be introduced. Second, the rationale of environmental taxation and the division of competences between the EU and the Member States in the fiscal domain are discussed. The following chapter focuses on the definition of fiscal State aid for environmental purposes and the application of the cumulative criteria under Article 107(1) TFEU, most importantly the notion of material selectivity. Finally, the justification of measures classified as State aid under Article 107(3) TFEU is explained, after which the findings of this dissertation are summarised.

1.3. Choice of methods

Most of the discussion of this dissertation is based on the legal-dogmatic approach, which focuses on the interpretation and systematisation[16] of EU law as shaped by the case-law of

[15] Kingston, 2012, p. 56. See also State aid Scoreboard, 2019, p. 20. Accordingly, tax advantages cover approximately 30 % of all State spending.
[16] Hirvonen, 2011, p. 22, 25.

the CJEU. In addition to textual interpretation based on the wording of the applicable provision, the systematisation of the legal norms and principles surrounding the one under interpretation is necessary, as the dynamic interpretation of the case-law of the CJEU presupposes linking the case at hand with its systemic surroundings as well as previous case-law.[17] This is what justifies the study of the role of Article 11 TFEU in the interpretation of Article 107(1) TFEU, for instance. According to settled case-law of the CJEU, when interpreting a provision of EU law, one must consider both the wording of that provision in its context and the objectives that it pursues.[18]

Hence, while a textual approach is admittedly the starting point, it is not alone sufficient in the interpretation of EU law. This is especially the case in the context of the Treaties, whose provisions are ambiguous and thus open for differing interpretations. Furthermore, it has been argued that the Treaties are in fact characterised by 'purpose-driven functionalism', by serving as a link between the objectives of the EU and the means to attain them.[19] Therefore, teleological interpretation emphasising the objective of the applicable provision plays a paramount role in the interpretation of the Treaty articles.[20]

In addition to the legal-dogmatic approach, the application of Article 107 TFEU will also be viewed in its societal context, by taking note of the relevant economic and social considerations when appropriate. This is due to the unique political framework of the EU, the nature of State aid law as a mediator of interests, the alleged instrumentalisation of EU law[21], as well as the fact that the findings of this study may serve law- and policymakers[22]. Because the application of State aid rules in the field of the environment is guided by instruments of soft law and is by its nature intertwined with opposing objectives, the efficiency of norms cannot be studied on grounds of positivist legal viewpoints only.[23]

[17] Raitio 2016, p. 186-188.
[18] C-283/81, *CILFIT v Ministero della Sanità*, ECLI:EU:C:1982:335, para. 20. To this effect, see also Joined Cases C-255/18, *State Street Bank International*, ECLI:EU:C:2019:967, para 34, C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, para. 31, C-379/15, *Association France Nature Environnement*, ECLI:EU:C:2016:603, para 49.
[19] Lenaerts; Gutierrez - Fons, 2014, p. 16.
[20] Ibid., p. 31.
[21] Van Gestel; Micklitz, 2014, p. 297-298.
[22] Minkkinen, 2017, p. 919.
[23] Määttä, 2000, p. 337-340.

The theoretical discussion, which, together with the examination of the case-law of the CJEU forms the backbone of this study, is based on academic literature and articles. Decisions of the Commission will be referred to when appropriate, although it builds upon the case-law of the CJEU when deciding on individual cases. However, the role of the Commission as a rule-maker is significant due to its competence to issue soft law guidance.[24] Hence, the relevant soft law instruments issued by the Commission will be referred to throughout the text. Finally, for the purposes of providing a comprehensive overview on the subject, some statistics and policy documents will be referred to in the introductory chapters.

[24] Chari et. al., p. 21-23. See also Commission Notice on the Notion of State Aid, 2016, the guidance of which is based on the rulings of the CJEU.

2. THE INTEGRATION OF EU STATE AID POLICY AND ENVIRONMENTAL POLICY

2.1. The objectives of fiscal State aid control and policy

According to Article 3 of the Treaty on European Union (TEU), the internal market of the EU shall be based on, inter alia, a highly competitive social market economy. The notion of market economy entails that the allocation of resources in the society is determined by supply and demand and should not be affected by State intervention.[25] Therefore, the very concept of State aid is fundamentally incompatible with the ideal of a market economy. However, the ideal of the market as an entirely self-regulating system has been found unfeasible, due to which it has been accepted that government intervention may sometimes be appropriate. For instance, it has been recognised that when undertakings are allowed to determine their own actions freely, they are likely to act in ways which are profitable to them but may be detrimental to the society as a whole.[26] Hence, well-planned utilisation of State aid in order to attain public policy objectives is supported by the present understanding of the functioning of the market economy in practise.

Whereas State aid policy is a part of competition policy, its objectives are not entirely equal to it. The objectives of State aid policy may be derived from the wording of Article 107(1) TFEU as well as from the guidelines of the Commission. Article 107(1) TFEU reads as follows: "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*". As the wording shows, State aid law has characteristics of both EU competition and internal market law. The 'competition policy objective' of State aid control is to ensure market efficiency and the resulting consumer welfare by restricting the use of aid measures which disturb the normal functioning of the market. The 'internal market objective', on the other hand, is to ensure proper functioning of the internal market by securing undistorted trade between the Member States.[27] It should be noted that State aid control applies to measures applicable within the Member State concerned, not

[25] Jones – Sufrin – Dunne, 2019, p. 2.
[26] Ibid. p. 2-3.
[27] De Cecco, 2013, p. 32, 38.

between Member States[28], although it is presumed that trade between the Member States is distorted when the other cumulative criteria are met as explained later below in Chapter 4.4.

Hence, State aid control aims to protect undistorted competition and trade. With respect to fiscal measures, it has been argued that an additional aim would be preventing harmful tax competition, as tax measures favouring certain undertakings may impair the level playing field of competition.[29] Although the prevention of harmful tax competition is not recognised as an independent objective[30], it is in line with the prohibition of distortion of competition and with the increasingly strict State aid control aimed at maximising the *effect utile* of Article 107(1) TFEU, which appears to also entail elements of fiscal control.[31]

It is considered that these aims are protected when aid measures are notified and subject to the review of the Commission, whose task is to ensure that the measure in question is justified, proportionate and necessary. Simply put, an aid measure may be considered compatible with the internal market only if it 1) contributes to a well-defined objective of common interest, and 2) there is a need for State intervention. Hence, State aid may be allowed when the measure in question addresses a situation where it can improve the functioning of the market by promoting the achievement of an objective which the market forces alone cannot attain. The aid measure should incentivise the undertakings concerned to engage in an activity which they otherwise would not carry out or would carry out in a different, less effective, manner.[32] With regard to State aid for environmental protection, the general objective is to increase the level of environmental protection compared to the level that would be achieved in the absence of the aid.[33] Therefore, the function of State aid control is to ensure that any detriment arising from distortions of competition is outweighed by the public purpose pursued by the aid.[34] An important point should already be mentioned at this stage, which is the so-called effects-based approach in State aid law. Accordingly, Article 107(1) TFEU does not make a distinction according to the causes or aims of the measure concerned but defines

[28] Ibid., p. 41.
[29] Terra – Wattel, 2012, p. 26, 107-108. See also Jiménez in *European tax integration: law, policy and politics*, 2018, p. 298.
[30] For criticism, see, inter alia, Opinion of AG Jääskinen in Joined cases C-106/09 P and C-107/09 P., *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:215, paras. 133-134.
[31] Jiménez in *European tax integration: law, policy and politics*, 2018, p. 295-297. See also Communication from the Commission, *EU State Aid Modernisation (SAM)*, COM(2012) 0209 final, para. 5, 14.
[32] See EEAG Section 3.1. para. 27.
[33] EEAG, Section 3.2.1.1. para. 30.
[34] EEAG, Section 3.1. para. 26. See also Chari et. al. in *State aid law of the European Union*, 2016, p. 6.

it according to its effects[35], meaning that the objective of the measure does not play a role in the assessment of whether it constitutes State aid under Article 107(1) TFEU or not.[36]

It may also be noted that the effects of State aid control are twofold in the sense that the interpretation of Article 107 TFEU results into negative market integration by indirectly bringing the practises in different Member States closer to each other, in addition to which the soft law instruments such as the guidelines issued by the Commission result into positive harmonisation of the permitted practices. The control via the interpretation of Article 107 TFEU protects competition and the internal market, whereas the Commission guidelines make use of State aid as a policy tool to attain EU level objectives in a manner which is considered efficient, even if they would not be directly linked with competition.[37]

The Member States on the other hand use State aid measures as a tool used to attain various public policy objectives by incentivising undertakings to behave in a manner which promotes the attainment of the objective in question.[38] When it comes to fiscal measures, the Member State government typically has several goals in addition to the general aim of raising revenue[39], such as the promotion of the protection of the environment. However, State aid control limits the regulatory autonomy of the Member States by defining which measures are permissible. In fact, the broad interpretation of the notion of State aid by the CJEU has arguably enabled the Commission to act in a rather autonomous way against the Member States.[40] In order to be in line with the *raison d'être* of State aid, the premise is that there must be a need for State intervention, which in terms of environmental taxes is often established by showing that they address a particular market failure.[41]

Negative externalities are amongst the most relevant market failures in the context of environmental State aid, which are defined as instances where markets do not produce efficient outcomes. In such cases, State intervention may improve the efficiency of the economy if

[35] C-173/73, *Italy v. Commission*, ECLI:EU:C:1974:71, para. 13, C-56/93, *Belgium v Commission*, ECLI:EU:C:1996:64, para. 79.
[36] See, for instance, Van de Casteele in *Competition Law. Vol. 4, State aid*, 2016, p. 188.
[37] De Cecco, 2013, p. 39-40.
[38] Chari et. al. in *State aid law of the European Union*, 2016, p. 3.
[39] Jiménez in *European tax integration: law, policy and politics*, 2018, p. 294.
[40] See, for instance, Peters, 2019, p. 14, and Bartosch in *Research Handbook on European State Aid Law*, 2011, p. 179.
[41] Verouden and Stehmann, 2016, p. 41.

the benefits of the intervention outweigh the costs.[42] Negative externalities arise when pollution is not adequately priced, i.e. the undertaking in question does not bear the full cost of pollution. In this case, undertakings may lack incentives to take the negative externalities arising from their activities into account, which leads to a situation where the production costs borne by the undertaking are lower than the costs borne by the society.[43]

Finally, it should be noted that activities which do not constitute a market failure may be subject to an aid measure, too, depending on preferences of the society.[44] However, the control appears relatively strict, as even the existence of a clear market failure may not justify the need for State intervention, because State aid should in principle be used as the last resort. This becomes apparent from the EEAG, according to which there is no need for State intervention if there are already policies or measures which address the market failure in question. Additional State aid measures may nevertheless be directed at a residual market failure, which remains unaddressed by other means.[45]

2.2. The objectives of environmental policy

2.2.1. Sustainable development and the objectives of EU environmental policy

When defining the environmental objectives of the EU, Article 3 TEU may likewise be referred to as a starting point. Accordingly, the general objectives of the EU include working for the sustainable development of Europe based on balanced economic growth as well as a high level of protection and improvement of the quality of the environment. Hence, sustainability and environmental values are embedded in the general policy of the EU. It is important to note however that the concept of sustainable development means integrating environmental, social and economic aims, and therefore necessitates balancing between the three aspects.[46] The social aspect would presuppose, for instance, that the different socio-

[42] Ibid., p. 40-42.
[43] EEAG, Section 3.2.2.1 para. 35(a). Externalities may also arise in the form of an action or negligence which may increase the costs of other actors which rely on a clean environment in their business activities. With this respect, see Verouden and Stehmann, 2016, p. 43.
[44] Verouden and Stehmann, 2016, p. 40-42. See also EEAG Section 3.1. para. 27(b).
[45] EEAG, Section 3.2.2.1 para. 36, Section 3.2.3.1. para 44, and Section 3.6. paras. 161-162. For instance, aid to Carbon Capture and Storage (CCS) in order to promote the long term decarbonisation objectives of the EU is considered to address a residual market failure, as the other instruments in place with this respect do not (yet) guarantee the full achievement of these objectives.
[46] Cordonier Segger; Weeramantry, 2004, p. 2-3. See also Cordonier Segger; Khalfan, 2004, p. 47.

economic realities of the Member States are considered when imposing binding emission reduction targets, i.e. the resulting financial burden should be in proportion to the resources of the Member State in question.

EU law does not provide for a clear-cut definition of the concept of sustainable development and nor do the various EU strategies mentioning it. Therefore, the enforceability of the concept has been questioned.[47] It has nevertheless been argued that its widespread use legitimises its classification as a general principle of law.[48] It appears that the following elements comprise sustainable development as a legal concept: 1) the need to preserve natural resources for the benefit of the future, 2) the aim of exploiting natural resources in a manner which is 'sustainable', or 'prudent', 3) the 'equitable' use of natural resources, which implies that use by one state must take account of the needs of other states, and 4) the need to ensure that environmental considerations are integrated into economic and other plans and that development needs are taken into account in applying environmental objectives (the principle of integration).[49] Out of these, only the integration principle discussed in Chapter 2.3.2. below is clearly a part of EU law, in addition to which Article 191(1) TFEU includes a mention of prudent use of natural resources.[50]

Be it as it may, it appears that the prevailing general policy of the EU is centred around the concept of *sustainable growth*, which may imply that climate / environment policy action is desirable as long as it does happen to the detriment of the economy. According to the Europe 2020 strategy, sustainable growth is based on a rather economic-centred model and the idea of maintaining global competitiveness, with the aim of building a resource efficient economy.[51] A textual reading of the Paris Agreement, to which the EU has adhered to[52], also appears to support this approach. For instance, Article 6.4 (a) thereof reads as follows: "*A mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development is hereby established [...] and shall aim [t]o promote the mitigation of greenhouse gas emissions <u>while</u> fostering sustainable development* " (underlining added). It

[47] Calster; Reins, 2017, p. 10.
[48] See, for instance, Voigt, 2015, p. 32, 38. The principle of sustainable development has been more elaborately defined in international environmental law and also invoke by international courts, although it is not well-established in this forum, either.
[49] Sands, 2003, p. 253-254.
[50] With respect to Union's external action, see also Articles 3(5) and 21(2)(d)-(f) TEU.
[51] EUROPE 2020, *A strategy for smart, sustainable and inclusive growth*, COM/2010/2020 final p. 12.
[52] See Article 216(2) TFEU.

may therefore be established that sustainable development is not an environmental principle, but more of a general objective of the EU, which includes taking environmental considerations into account in decision-making but not prioritising them. Because sustainability necessitates balancing between the social, economic and environmental aspects, it is inevitably defined on a case-by-case basis and therefore applied differently in different contexts. Furthermore, as a result of its abundant but vague use, the concept has suffered an inflation.[53] However, there is some discussion among academics about whether the sustainable development should in fact mean prioritising environmental concerns. In the light of the pressing climate crisis, the interpretation according to which the principle of sustainable development necessities the balancing of economic, social and environmental objectives within the ecological limits of the planet[54] could provide an feasible tool for the assessment of cases which by their nature entail a balancing between various objectives. With this line of reasoning, if a State aid measure would not be realisable in the long-term due to its environmental impacts, it could be considered as a negative effect to the functioning of the internal market, which should be outweighed by other positive effects of the measure.

Article 191(1) TFEU lists the actual environmental objectives of the EU, according to which the EU policy on the environment shall contribute to pursuit of: 1) preserving, protecting and improving the quality of the environment, 2) protecting human health, 3) prudent and rational utilisation of natural resources, and 4) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. These rather vague objectives cannot be enforced themselves on grounds of the Treaty but require transposition and elaboration.[55]

Furthermore, according to Article 191(2) TFEU, EU policy on the environment shall aim at a high level of protection, taking the diversity of situations in the regions of the EU into account. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a rule be rectified at source, and that the polluter should pay.[56] The aim is not to maximise the protection of the

[53] Krämer, 2011, p. 11.
[54] Voigt, 2015, p. 38, 44-46, 48. See also Voigt, 2013, p. 152-154.
[55] Calster; Reins, 2017, p. 9, Krämer, 2011, p. 8 and 15. See also, for instance, Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, para. 29.
[56] In addition to these substantive principles of EU environmental law, the general principles of subsidiarity and proportionality included in Article 5(3) TEU are applicable to environmental matters, too. See, for instance, Calster; Reins, 2017, p.19.

environment, however, as the aim of high level of environmental protection must be balanced against economic objectives, as expressed by the CJEU.[57] The CJEU has also stated that Article 191(2) TFEU does no more than define the general environmental objectives of the EU, since it confers the responsibility for deciding what action is to be taken in order to attain those objectives on the European Parliament and the Council of the European Union.[58] It may however be noted that the status of the environmental principles is subject to some level of unclarity. For instance, the GC has referred to the precautionary principle as a general principle of EU law.[59]

Nevertheless, it is well established that the protection of the environment constitutes one of the essential objectives of the EU[60], and that the objectives stemming from Article 3(3) TEU and 191(1)-(2) TFEU must be reconciled with other provisions of EU primary law.[61] With respect to economic considerations, the CJEU has stated that the EU's tasks include the promotion of sustainable and non-inflationary growth respecting the environment.[62] In terms of EU energy policy, the CJEU has stated that it is clear from Article 194(1)(c) TFEU that the development of renewable energy is one of the objectives that must guide it.[63]

Finally, it should be noted that the objectives of energy policy are not necessarily related to the environment[64], although some energy taxes are categorised as environmental taxes as discussed later below. For instance, the primary objective of the Energy Taxation Directive 2003/96/EC (ETD) is the proper functioning of the internal market, but the secondary objectives are various ranging from environmental ones to ones relating to the competitiveness of the EU economy.[65]

[57] C-343/09, *Afton Chemical*, ECLI:EU:C:2010:419, para. 56.
[58] Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, para. 28, C-129/16, T*úrkevei Tejtermelő Kft*., ECLI:EU:C:2017:547, para. 36. See also C-534/13, *Fipa Group and Others*, EU:C:2015:140, para. 39 and the case-law cited.
[59] T-392/02, *Solvay Pharmaceuticals v Council*, ECLI:EU:T:2003:277, para. 121
[60] See, for instance, Case 240/83, *Procureur de la République v ADBHU*, ECLI:EU:C:1985:59, para. 13, C-302/86, *Commission v Denmark*, ECLI:EU:C:1988:421, para 8.
[61] C-379/15, *Association France Nature Environnement*, ECLI:EU:C:2016:603, para. 35-36.
[62] C-213/96 *Outokumpu*, ECLI:EU:C:1998:155, para. 32.
[63] See Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16, *Elecdey Carcelen*, ECLI:EU:C:2017:705, para 38, C-242/17, *L.E.G.O.*, ECLI:EU:C:2018:804, para. 64, C-549/15, *E.ON Biofor Sverige*, ECLI:EU:C:2017:490, para. 85, C-492/14, *Essent Belgium*, EU:C:2016:732, para. 101, C-573/12, *Ålands Vindkraft*, ECLI:EU:C:2014:2037, para. 78, and C-379/98, *PreussenElektr*a, ECLI:EU:C:2001:160, para. 73.
[64] See, for instance, Ezcurra, 2014.
[65] Commission Staff Working document, evaluation of the Council Directive 2003/96/EC, SWD(2019) 329 final, p. 7.

2.2.2. The polluter pays principle

In terms of the environmental principles of the EU, the polluter pays principle (PPP) is the most relevant in the context of environmental State aid and especially in relation to environmental taxation. The PPP necessitates that authorities should promote the internalisation of environmental costs and the use of economic instruments because the polluter should in principle bear the cost of the pollution it causes.[66] In other words, it is against the PPP if the cost of environmental pollution caused by undertakings is borne by the public.[67] The internalisation of the negative environmental costs requires State intervention either by means of taxation that corresponds to the estimated economic value of the environmental damage or by means of imposing regulatory standards which address the activity that is considered harmful.[68] The logic of the PPP is also reflected in the definition of an environmental tax in the context of State aid as laid down in the EEAG as discussed later below.[69]

The case-law of the CJEU appears to confirm that the PPP is not of independent nature, but may instead be referred to either in a complementary manner or when codified in secondary legislation just like the other principles laid down in Article 191(2) TFEU.[70] It has been argued that the PPP should be applied consistently with the principle of prevention, as it should step in once the application of the prevention principle has failed and the damage has occurred.[71] The prevention principle necessitates that risks which occur or are likely to occur while carrying out a certain activity must be addressed so that the action concerned does not damage the environment.[72] The reliance on the PPP alone in the context of State aid may thus be criticised as insufficient as it could be argued that it in effect grants a right to pollute with an attached price, which, for the polluting undertaking, merely represents a supplementary tax. In principle, this also encourages polluters to pass their costs onwards.[73]Although both of these principles promote addressing the negative effects of climate change and could therefore, in principle, be referred to when justifying the need for environmental State aid,

[66] The United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, 1992, principle 16. See also EEAG, Section 1.3. para. 28.
[67] Opinion of AG Kokott in Case C-169/08, *Presidente del Consiglio dei Ministri*, ECLI:EU:C:2009:420, para. 74.
[68] De Sadeleer, 2002, p. 21, 28.
[69] EEAG, Section 19 paras. 15, 25-28.
[70] See e.g. Case C-534/13, *Fipa Group and Others*, ECLI:EU:C:2015:140, paras. 38-42.
[71] Calster; Reins, 2017, p. 37. See also De Sadeleer, 2002, p. 35-36.
[72] Calster; Reins, 2017, p. 33-34. See also Declaration of the United Nations Conference on the Human Environment, 1972, principle 21.
[73] De Sadeleer, 2002, p. 35-36.

they are rarely expressly relied on as a justification for an aid measure. One recent judgement, however, may be discussed by means of example.

The judgement of the GC in Case T-356/15 concerns State aid granted in support of the Hinkley Point C nuclear power station, which was notified by the United Kingdom and Northern Ireland and opposed to by Luxembourg and Austria. Austria and Luxembourg argued that there is a conflict between the promotion of nuclear energy and the principle of protection of the environment, and the PPP, amongst others.

Here, the GC started with an argument which may be characterised as both procedural and teleological, stating that because the United Kingdom did not specifically intend, through the State aid measures at issue, to give effect to these principles, the Commission was not obliged to take them into account. Second, the GC pointed out that although protection of the environment must be integrated into the definition and implementation of EU policies, it does not constitute, per se, one of the components of the internal market, which is characterised by the four fundamental freedoms. Consequently, the Commission was not obliged to consider the extent to which the measures at issue are detrimental to the implementation of these principles. Lastly, the GC emphasised the complementary nature of these principles and stated that no EU environmental legislation was invoked in this connection.[74] Hence, it appears that the consideration of environmental objectives is limited to the justification of State aid for environmental purposes or to cases where such principles are enforced in secondary legislation applicable in the case in question.

Importantly, however, Article 11 TFEU provides that environmental protection requirements must be integrated into the definition and implementation of EU policies and activities. The significance of Article 11 TFEU and other relevant provisions promoting policy integration will be discussed next.

[74] T-356/15, *Austria v Commission*, ECLI:EU:T:2018:439, paras. 110, 512-518. See also T-57/11, *Castelnou Energía v Commission*, ECLI:EU:T:2014:1021, paras. 189-191.

2.3. The integration of the two policies

2.3.1. The elasticity of EU competition policy

The basic idea behind competition policy is that distortions of competitions result into efficiency losses, which in turn decrease consumer welfare, as in the context of competition policy, total welfare equals to the effectiveness of market performance. In the context of EU competition policy, consumer welfare has been equalised as better quality, lower prices, and a wider choice of goods and services.[75] When assessing the impacts of climate change policy to welfare costs, for instance, the costs of all the different individual actions that need to be taken should be calculated.[76] Hence, factors such as a clean environment are not considered when calculating consumer welfare.

It has however been argued that because safeguarding the functioning of the internal market is a central objective of Article 107(1) TFEU, it should be understood in a broader context than merely on the basis on conditions of competition.[77] The broad understanding of Article 107(1) TFEU would require that the objectives of the internal market as a whole are taken into account when designing State aid control, which would necessitate balancing between several Treaty objectives, including those relating to the environment.[78] In principle, the application of State aid rules should not lead to a situation which is contrary to any other specific Treaty provision.[79]

Opinions amongst legal scholars and economists about whether such an approach which would allow the consideration of non-economic objectives in competition policy, including State aid policy, differ. Traditional ordoliberal theory, significant especially at the early stages of the competition policy of the EU, aims at guaranteeing the freedom of competition but also considers economy as interdependent with other policy areas within the society and

[75] In this regard, see, for instance, Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, (2009/C 45/02), para 5. However, it should be noted that The CJEU has not always adhered to the same (economic) consumer welfare standard as the Commission. Instead, it has stated on several occasions that the function of competition rules is "*to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union*". With this respect, see Jones – Sufrin – Dunne, 2019, p. 49.
[76] Krupnick and Parry, 2012, p. 9.
[77] See, inter alia, De Cecco, 2013, p. 31.
[78] Chari et. al., 2016, p. 9.
[79] See, for instance, Case C-113/00, *Spain v Commission*, ECLI:EU:C:2002:507, para. 78.

takes note on the interaction between different policy decisions. *Kingston* argues that it therefore rejects a purely textual reading of law to the detriment of fundamental objectives expressed in the Treaties, and thus requires that other objectives laid down therein must be taken into account in competition policy, too.[80] According to a more narrow view, however, the aim of ordoliberalism is simply to protect competition.[81]

Nevertheless, *De Cecco* has observed that the current State aid regime appears to be far away from the ordoliberal model in practice.[82] This is backed up by the findings of *Bartalevich*, according to whom it appears that the EU has shifted from the somewhat ordoliberal-based approach to a 'more economic' one[83], influenced by the Chicago school theory, which leaves no room for non-economic considerations as it views efficiency as the only goal of competition law.[84] This approach omits policy considerations and focuses on economic rationality, aiming solely at the maximisation consumer welfare and efficient allocation of resources.[85] The concept of the 'more economic approach' is however not deductible to a single competition theory, but instead means more extensive use of economic insights when applying competition law.[86] Furthermore, it does not imply that State aid control has become a fully 'economic' field in the application of law.[87] Therefore, while it indeed appears that efficiency considerations have gained a strong stance, there may still be room for other considerations, too. This is true especially in the field of State aid policy, which may be used to serve public interest objectives such as environmental ones as explained above.

In my opinion, strict adherence to economic indicators only may be problematic, as at the Member States are obliged to meet certain emission reduction targets imposed by secondary legislation, such as the Effort Sharing Regulation 2018/842/EU.[88] A particular issue with this respect is that State aid control restricts the strategic use of regulation.[89] Hence, the regulatory means which Member States may use to channel aid towards the protection of the environment is limited by the rules laid down in the EEAG and the application of Article

[80] Kingston, 2012, p. 17-19.
[81] Jones – Sufrin – Dunne, 2019, p. 27-28, Nowag, 2017, p. 34-35.
[82] De Cecco, 2013, p. 55
[83] The 'more economic approach' in fact means the 'consumer welfare approach' to EU competition law, see Jones – Sufrin – Dunne, 2019, p. 48.
[84] Bartalevich, 2016, p. 267-271 and 279-280. See also Jones – Sufrin – Dunne, p. 15-19.
[85] Schweitzer; Patel, 2013, p. 207-208.
[86] Schweitzer; Patel, 2013, p. 220. See also Kingston, 2012, p. 38-39.
[87] Verouden and Stehmann, 2016, p. 92.
[88] See Article 4 of the Regulation.
[89] De Cecco, 2013, p. 55.

107 TFEU. It has been argued that the need for political steering via the means of State aid will only grow in the coming decades, as it provides a means to pursue climate change objectives especially in the energy sector.[90] Hence, more flexibility may be called for in the future.

In fact, *Jones*, *Sufrin*, and *Dunne* argue that the recognition of climate change crisis will inevitably result into increasing calls for competition policy to take account of climate change issues as its major consideration.[91] This is reflected in Regulation (EU) 2018/1999, too, according to which socially acceptable and just (this refers to the distribution of the economic burden resulting from the required actions) transition to a sustainable low-carbon economy necessitates changes in investment behaviour, as regards both public and private investment.[92] Indeed, the relevant State aid rules will be revised by 2022 in the light of the policy objectives of the European Green Deal in order to better enable sustainable investments. With this respect, it is positive that one aim is to allow for more flexibility in the use of State aid in the transition to climate neutral production processes. It is nevertheless clear that the underlying logic remains the same: public support should be limited to what is necessary, as market forces should as a rule incentivise action to the desired direction.[93]

2.3.2. Article 11 TFEU

As discussed above, the Treaties include several provisions which in one way or another promote policy integration. Already the reference to sustainable market economy expressed in Article 3(3) TEU speaks for an integrated policy, which is further endorsed by Article 7 TFEU, according to which the EU shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers. In addition, Article 37 of the Charter of Fundamental Rights of the European Union requires that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the EU and ensured in accordance with the principle of sustainable development.[94] In fact, the wording of this

[90] Schöning and Ziegler, 2018, p. 4.
[91] Jones – Sufrin – Dunne, 2019, p. 34.
[92] Regulation (EU) 2018/1999, recital 19.
[93] Communication from the Commission, Sustainable Europe Investment Plan, COM(2020) 21 final, p. 12-13.
[94] See Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407. See also Article 51 of the Charter of Fundamental Rights and Article 6(1) TEU.

article is very similar to the wording of Article 11 TFEU, which is particularly significant in the context of this dissertation. It reads as follows: "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*"

On a general note, it may be observed that EU State aid law, like Article 11 TFEU, is characterised by the balancing of interests, as State aid policy may be used as a policy tool at the expense of market efficiency. However, the application of environmental integration obligation laid down Article 11 TFEU has been rather limited especially in the field of competition law[95], regardless of the fact that it has been characterised by the ECJ as a provision which emphasises the fundamental nature of the objective of protection of the environment and its extension across different policies and activities.[96] Next, we will enter the discussion on why this leaves room for improvement.

When discussing the legal status of Article 11 TFEU, it is noteworthy that the Maastricht Treaty specifically modified its wording so that it imposed a binding obligation.[97] It therefore imposes a concrete obligation to integrate environmental protection requirements in all policies and activities of the EU, taking the objectives of environmental policy laid down in Article 191(1)-(2) TFEU into account.[98] It has also been argued that it requires the CJEU to choose the most environmentally-friendly option when weighing up ecological and economic interests.[99] Hence, the *ratio legis* of Article 11 TFEU is that EU law must be interpreted in a manner which renders it consistent with environmental protection requirements laid down in Articles 191 TFEU and 3 TEU.[100] However, the scope of application of the article and its legal status remain unclear.

Nowag argues that Article 11 TFEU binds the EU institutions both in policy-making and when adopting individual measures, such as competition decisions.[101] In contrast, it has also been argued that it only applies at the stage of general policy-making at EU level and not to

[95] Nowag, 2015, p. 15.
[96] C-176/03, *Commission v Council*, ECLI:EU:C:2005:542, paras. 41-42.
[97] Nowag, 2017, p. 16, De Sadeleer, 2014, p. 25.
[98] Voigt, 2015, p. 46-47. See also Krämer, 2011, p. 20-21, Opinion of AG Jacobs in Case C-379/98, *PreussenElektra*, ECLI:EU:C:2000:585, para. 231.
[99] De Sadeleer, 2014, p. 29. See also Opinion of AG Jacobs in Case C-379/98, *PreussenElektra*, ECLI:EU:C:2000:585, para. 232.
[100] Nowag. 2017, p. 20. See also Nowag, 2015, p. 28-29.
[101] Nowag. 2017, p. 21, Sjåfell, 2015, p. 56-62, 64-65.

individual decisions.[102] However, according to the wording of the article itself, it applies to both EU policies *and* activities. It is difficult to argue that activities could not include EU measures, such as competition decisions. Furthermore, Article 11 TFEU speaks of implementation, due to which the *effect utile* of the provision would necessitate that Member States may have to respect it while implementing EU policies and activities.[103] The case-law of the CJEU appears to support *Nowag*'s line of interpretation to some extent, as it has referred to Article 11 TFEU in the connection of application of EU law and not merely in the context of implementation of EU policies.[104]

According to *Kingston*, Article 11 TFEU is a clear objective of EU policy, not a principle, as there is no discretion left for the EU institutions with respect to its application in a specific situation. In contrast, principles require a weighing up or balancing process in applying them in a specific case.[105] On the other hand, the application of the environmental integration obligation as an overarching principle could allow its use in a similar manner than the general principles of EU law such as the proportionality principle. This would mean that the integration obligation could be used as guidelines in the balancing of conflicting rules and therefore also in ensuring coherence with the aims and values of the EU.[106] In fact, Article 11 TFEU in principle satisfies many of the elements generally considered as the criteria for a general principle of EU law: it carries legal effects, is general in nature but appropriately precise, and has a fundamental status granted upon by primary law. However, a status as a general principle would also necessitate that its proclaimed as such by the CJEU in a manner which renders it binding on the Member States when implementing EU law[107], which, as explained above, remains under debate.

Integration with a view of promoting sustainable development naturally necessitates balancing between the economic, social and environmental interests. With respect to the balancing between the different objectives, *Kingston* has provided three different options for the

[102] See, for instance, Krämer, 2011, p. 21.
[103] Nowag, 2017, p. 23-24, Kingston, 2013, p. 85.
[104] See, for instance, Joined Cases C-626/15 and C-659/16, *Commission v Council (AMP Antarctique)*, ECLI:EU:C:2018:925, paras. 100-101, C-549/15, *E.ON Biofor Sverige*, ECLI:EU:C:2017:490, para. 48, C-513/99, *Concordia Bus Finland*, ECLI:EU:C:2002:495, para. 57.
[105] Kingston, 2013, p. 89-90. See also Thieffry, 2018, p. 70, who also argues that Article 11 TFEU constitutes a rule and not a principle, although arguing for a more limited scope of application than Kingston.
[106] See Koskenniemi, 1985, p. 134-136, who is discussing the nature of principles as legal norms considering the theories provided by scholars such as Dworkin, Eckhoff and Sundby.
[107] See by analogy, Wimmer, 2014, p. 333-334.

hierarchical status of Article 11 TFEU. According to the first one, decision-makers could choose whether or not to adjust their policies, as long as they simply take environmental considerations into account – an option which may be rejected due to the constitutional status of environmental considerations in the Treaties as discussed above.[108] If Article 11 TEU is understood merely as a procedural obligation, there is a risk that it leads to situations where economic interests are seen as the primary interest, to which the other (environmental) considerations are subsumed.[109]

According to the second option provided by *Kingston*, decision-makers must pursue environmental aims systemically alongside each specific sectoral objective in question, and where several options are possible, choose the most environmentally friendly one. This approach has been supported by *Nowag* who considers it to be consistent with the Treaties.[110] In fact, the duty to seek balance between the various objectives of the Treaties is itself an intrinsic part of EU law, reflected in Articles 2 and 3 TEU, which prioritise no objective over another.[111] In my opinion, this approach could provide enough guidance to authorities while allowing them to take their national circumstances as well as the specific circumstances of the case at issue into account in line with the division of competences.

The third option would necessitate prioritising environmental protection requirements over all conflicting objectives, an interpretation *Kingston* herself promotes for and other scholars such as *Wiesbrock* have supported.[112] I agree with *Kingston* to the extent that the third option fits best with the majority of scientific opinion with regard to the detrimental effects of climate change. I also adhere to her view according to which sufficient environmental resources are a fundamental prerequisite for the social market economy and that in the end, consumer surplus is dependent on the sufficiency of environmental resources and the ability of the environment to provide essential services in the future.[113] However, I find it challenging to argue that the wording of the Treaties would lead one to conclude that environmental requirements should always be given priority – as established above, no priority in terms of EU objectives appears to have been prescribed for in the Treaties. On the other hand, a more

[108] Kingston, 2012, p. 113.
[109] Voigt, 2015, p. 41.
[110] Kingston, 2012, p. 113, Nowag, 2017, p. 30.
[111] Nowag, 2017, p. 30, Krämer, 2011, p. 20.
[112] Kingston, p. 2012, p. 113-114 and Wiesbrock, 2015, p. 75-76.
[113] Ibid. p. 114-115, 189.

teleological approach could lead to a different conclusion. Should the principle of sustainable development be enforced in a manner which would in reality necessitate giving priority to the sustainability of the planet, then also already the wording of Article 11 TFEU would require that the integration of environmental protection requirements into the implementation of the EU's policies and activities should be done in a sustainable manner which respects the limits of the planet and its bearing capacity also in the future.[114] This option cannot be excluded, although in the light of the nature of EU politics, which are characterised by the balancing of the varying interests and socio-economic realities of the Member States, its materialisation appears unlikely at least in the near future. What is clear is that the principle of integration does not mean that environmental objectives may merely be routinely balanced against other fundamental objectives of the EU.[115]

Nowag has studied how Article 11 TFEU could and has been applied in EU State aid law and has presented a theory according to which the integration obligation laid down therein may be divided into preventative and supportive integration. Preventative integration means integration at the level of the concept of State aid itself. According to *Nowag*, this would necessitate taking environmental considerations into account already in the classification of aid under Article 107(1) TFEU, an option discussed in detail Chapter 4 below.[116] Supportive integration – integration by means of balancing – is the prevailing method of interpretation in the context of State aid and is most clearly adhered to in the jurisprudence of the CJEU. Supportive integration means the consideration of environmental objectives when balancing the negative and positive effects of the aid under Article 107(3) TFEU, as discussed later in Chapter 5.[117] However, as *Wiesbrock* and *Nowag* point out, taking environmental considerations into account only when assessing the compatibility of the measure under 107(3) TFEU and not in the context of classification of aid under 107(1) TFEU does not comply with Article 11 TFEU, if it is understood as requiring the consideration of environmental objectives at all stages of decision-making. In order for the State aid policy to be fully in line with the integration principle, environmental considerations should be integrated into the application of both Article 107(1) and 107(3) TFEU.[118]

[114] Voigt, 2015, p. 45, Sjåfell, 2015, p. 60-61.
[115] See Opinion of AG Bot in Joined Cases C-204/12 to C-208/12, *Essent Belgium*, ECLI:EU:C:2013:294, para. 97.
[116] Nowag, 2017, p. 145-146
[117] Nowag, 2017, p. 180-182.
[118] Wiesbrock, 2015, p. 77, Nowag, 2017, p. 110.

As mentioned above, the integration principle plays a particularly important role when assessing whether a given measure may be considered compatible with the internal market under Article 107(3) TFEU.[119] According to the prevailing judicial discourse, the requirements arising from the environmental integration principle are thus as a rule only taken into account when considering whether a national measure which has already been classified as State aid may be exempted from the general prohibition State aid, as in line with the effects-based approach, the question of whether a given measure constitutes aid is assessed on grounds of its effects on the market, not its objectives.[120] Hence, it appears established case-law that public policy objectives are not considered when classifying a particular measure as State aid, but only when assessing whether that measure is compatible with the internal market and therefore justified under Article 107(3) TFEU.[121]

Therefore, environmental objectives are as a rule not taken into account when applying Article 107(1) TFEU, although some exceptions exist. Furthermore, there are some indicators which imply that the CJEU may be departing from its strict adherence to the effects-based approach. The following chapters discuss whether the interpretation of the State aid provisions in their broader legal context would in fact necessitate its reconsideration and allow the consideration of the public policy objective to some extent already in the context of Article 107(1) TFEU. With respect to fiscal aid measures, there appears to be some room for flexibility in the assessment of material selectivity in particular.

[119] See, for instance, Opinion of AG Mengozzi in Case C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:419, para. 102.
[120] See, i.e., C-241/94, *France v Commission*, ECLI:EU:C:1996:353, para. 20, C-126/01, *GEMO SA*, ECLI:EU:C:2003:622, para. 34, C-172/03, *Heiser*, ECLI:EU:C:2005:130, para. 46, C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:757, para. 85, C-279/08 P, *Commission v Netherlands*, ECLI:EU:C:2011:551, para. 75, Joined cases C-71/09 P, C-73/09 P and C-76/09 P, *Comitato "Venezia vuole vivere" and Others v Commission*, ECLI:EU:C:2011:368, para. 94, C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, ECLI:EU:C:2015:354, para. 75, C-203/16 P, *Andres (faillite Heitkamp BauHolding) v Commission*, ECLI:EU:C:2018:505, para. 91.
[121] See, inter alia, C-487/06 P, *British Aggregates v Commission*, EU:C:2008:757, para. 92.

3. FISCAL STATE AID FOR ENVIRONMENTAL PURPOSES

3.1. Division of competences in the field of fiscal State aid

For the purposes of understanding fiscal State aid for environmental purposes, especially in the form of reductions of or exemptions from environmental and energy taxes, it is important to be aware of the division of competences between the EU and the Member States with this respect. The tension is clear: EU-wide State aid control limits the national authorities' freedom to pursue their environmental and taxation policies, and thus also the means by which the Member States may aim to attain the climate policy targets imposed by binding EU and national law.

The EU has exclusive competence in establishing the competition rules necessary for the functioning of the internal market, hence also in State aid law. However, the EU and the Member States share competence with regard to the environment and energy, which means that the Member States are free to legislate in environmental matters which have not (yet) been regulated at EU level.[122] This is also reflected in the EEAG, according to which an aid measure may be compatible with the internal market under Article 107(3)(c) TFEU if it goes beyond EU standards on environmental protection or increases the level of environmental protection in the absence of EU standards, for instance.[123]

The rationale of the principle of conferral means that the EU shall act only within the limits of the competences conferred upon it by the Treaties, and competences not conferred upon the EU remain with the Member States.[124] Taxation is not among any of the competences expressly conferred upon the EU and therefore in principle remains within the competence of the Member States, although they must respect EU law while implementing fiscal measures.[125] However, as the EU has exclusive competence in the field of customs union, all customs duties on imports and exports are within the competence of the EU.[126] In addition, the EU institutions may intervene in the field of taxation when national tax measures

[122] Articles 3-4 TFEU. See also Barnand and Peers, 2017, p. 108-109.
[123] See EEAG, Section 1.2. para. 18(a).
[124] Articles 4(1) and 5(2) TEU.
[125] Communication from the Commission, Tax policy in the European Union - Priorities for the years ahead, COM(2001)260 final, p. 8.
[126] See Articles 3.1.(a) and 28 TFEU.

may affect the functioning of the internal market, which in turn is within the shared competence of the EU and the Member States.[127] The legislative action of the EU in the field of taxation has mostly concerned indirect taxes (such as excise duties and VAT) based on Article 113 TFEU.[128] In fact, a significant number of aid for environmental protection in the form of tax reliefs and exemptions are granted based on harmonised EU law on indirect taxes, which are also subject to State aid control in case the application of the provision in question entails discretion or when the Member States introduce additional advantages going beyond those laid down in the harmonisation directive.[129] Member States are free to grant exemptions or reductions from environmental taxes in non-harmonised areas when they serve legitimate purposes and do not fulfil the cumulative criteria laid down in Article 107(1) TFEU.[130]

The only provision which may be applied in the harmonisation of direct taxes (such as company taxes) is Article 115 TFEU[131], which requires unanimity in the Council. Hence, the main rule is that direct taxation falls within the exclusive competence of the Member States, although it must be exercised consistently with EU law.[132] Direct taxation is therefore reserved to the Member States' sovereignty insofar as it is a tool of general economic policy and there is no harmonisation at EU level, although Commission may review measures in this field too in order to ensure that they are not selective by nature.[133] In general, State aid control today is also a means of tax policy convergence between the Member States, which have to align their policies in accordance with the rulings of the Commission and the CJEU.[134] It appears the State aid control with regard to fiscal measures has become stricter over recent years[135], especially due to the broad interpretation of the selectivity criterion discussed later below.

Furthermore, the competences of the EU have expanded beyond those defined in the Treaties, partly due to the so-called judicial activism of the CJEU and partly due to the vast

[127] Pistone and Szudoczky, 2018, p. 36, see also Article 4.2.(a) TFEU.
[128] Lovdahl-Gormsen, 2019, p. 98, Article 113 TFEU.
[129] In this regard, see Commission Notice on the Notion of State aid, 2016, Section 3.1.2. paras. 44-45. See also Schöning and Ziegler, 2018, p. 23, Ezcurra, 2016, p. 198-199, Englisch, 2013.
[130] C-148/77, *Hansen v Hauptzollamt Flensburg*, ECLI:EU:C:1978:173, para. 16.
[131] Pistone and Szudoczky, 2018, p. 10.
[132] See, for instance, C-383/10, *Commission v Belgium*, ECLI:EU:C:2013:364, para. 40.
[133] Terra-Wattel, 2012, p. 36-37, Merola. 2016, p. 537-538.
[134] Peters, 2019, p. 8.
[135] Rauhanen, 2017, p. 15-16.

amount of secondary legislation.[136] Harmonisation by means of secondary law or soft law is called positive integration, whereas harmonisation which results from the interpretation of (primary) law by the CJEU is called negative integration.[137] The latter will be paid attention to when assessing the interpretation of prohibition of State aid laid down in Article 107 TFEU by the CJEU, as it has led to *de facto* indirect tax harmonisation in the field of environment and energy.[138] Generally speaking, negative integration and positive integration by means of soft law instruments raise more issues of legitimacy, as they are not a result of a political choice manifested in a legislative decision.[139] It appears that the EU is at a turning point with respect to its approach to tax matters, and the direction seems to be towards increasing positive harmonisation.[140] Although not necessarily in line with the division of competences, positive harmonisation by means of legislation could be more in line with the principles of democratic decision-making than coordinating the tax systems of Member States be means of negative harmonisation 'through the backdoor'.

In addition, one must recall that that the Commissions enjoys broad powers and wide discretion in the exercise of State aid control.[141] This results from, inter alia, the loose definition of State aid on the one hand, and the necessary balancing included in the assessment the compatibility of the aid measure with the internal market under Article 107(3) TFEU, on the other.[142] The CJEU has stated in this respect that it should restrict itself only to determining whether the Commission has exceeded the scope of its discretion by a distortion or manifest error of assessment of the facts or by misuse of powers.[143] Hence, State aid control is also significantly shaped by the interpretation of the Commission.

[136] Lovdahl-Gormsen, 2019, p. 93-94.
[137] Pistone and Szudoczky, 2018, p. 36-39, Terra-Wattel, 2012, p. 36-37.
[138] See, for instance, Ezcurra, 2016, p. 217.
[139] Lovdahl-Gormsen, 2019, p. 113. See also De Cecco, 2013, p. 49.
[140] Communication from the Commission, Towards a more efficient and democratic decision making in EU tax policy, COM(2019) 8 final.
[141] C-333/07, *Regie Networks*, ECLI:EU:C:2008:764, para. 78 and case-law cited. See also Ianus et. al., 2016, p. 224-227.
[142] Chari et. al., 2016, p. 55-56.
[143] C-225/91, *Matra v Commission*, ECLI:EU:C:1993:239, para. 25, C-73/11, *Frucona Košice v Commission*, ECLI:EU:C:2013:32, paras. 74-76 and case-law cited.

3.2. Environmental taxation and State aid

3.2.1. Definition of an environmental tax

According to the general definition adopted in the EU, an environmental tax is "*a tax whose tax base is a physical unit (or a proxy of it) of something that has a proven specific negative impact on the environment*."[144] However, the definition of an environmental tax in State aid context is broader, as it incorporates the idea of changing polluting behaviour. In State aid context, "*environmental tax means a tax with a specific tax base that has a clear negative effect on the environment or which seeks to tax certain activities, goods or services so that the environmental costs may be included in their price and/or so that producers and consumers are oriented towards activities which better respect the environment*."[145] Hence, in State aid context, environmental taxes are not characterised by their specific tax base only, but also by their environmental objective.[146]

The prevailing issue is the lack of consistent interpretation of the concept, and the question of what kind of fiscal measures may be included within the scope of aid for the protection of the environment remains unclear. As a result, fiscal measures which are not always in reality capable of promoting environmental protection are sometimes considered under the rules for aid for environmental protection.[147] For instance, exemptions or reliefs from an energy tax may be classified as aid for the purposes of environmental protection even though they would not in fact be able to promote environmental protection.[148] The Energy Taxation Directive 2003/96 (ETD) is under discussion with this respect, as it lays down rules based on the volume of the energy products consumed instead of their energy content. This has led to taxation which is against the climate policy objectives: for instance, renewable energy may be taxed at a higher rate than a competing fossil fuel, as long as the minimum rates laid down in the ETD are respected.[149] It should be guaranteed that only those measures in the field of energy taxation whose objectives are truly environmental are treated under the framework of State aid for environmental protection.[150] Nevertheless, what constitutes State

[144] Eurostat, Environmental taxes – A statistical guide, 2013, p. 9.
[145] See GBER, Article 2(119) and EEAG, Section 1.3. para. 19(15).
[146] T-210/02, *British Aggregates v Commission*, ECLI:EU:T:2006:253, para. 114.
[147] See, inter alia, Wiesbrock, 2015, p. 91-92.
[148] Ezcurra, 2017, p. 11-12, 15.
[149] Ezcurra, 2016, p. 207.
[150] Ezcurra, 2017, p. 21-22.

aid with respect to fiscal measures in the energy and environment sector still depends largely on the interpretation of the cumulative criteria by the CJEU as discussed in Chapter 4.[151]

3.2.2. Rationale of environmental taxation

Environmental taxes belong to the category of market-based instruments (MBI), that is, economic regulatory instruments based on their incentive effect. Simply put, MBI provide incentives which guide behaviour towards a desired outcome, in this case, environmentally friendly action. Their aim is to internalise the negative environmental externalities into the market actor's decision-making processes[152] by using market signals to address the market failure concerned.[153] The State's role in addressing these failures may be clarified by citing the following statement of AG Jacobs: '…*In the absence of State intervention, a producer[…]causing air pollution does not pay for that pollution. He can therefore ignore the costs to society in deciding how much to produce and at what price to sell his products. Pursuant to the polluter pays principle the costs of measures to deal with pollution should be borne not by society through general taxation but by the polluter who causes the pollution. The costs associated with the protection of the environment should be included in a firm's production costs (internalisation of costs). The principle can be put into practice through a variety of State measures such as the taxation of pollution*.[154] Hence, the imposition of environmental taxes generally supports the PPP.

The fundamental logic behind environmental taxes comes from *Pigou*, as summarised by *Milne*: When the private sector imposes costs on society, a tax can shift those costs back to the private sector, which should result in decision-making therein which enhances the general welfare of the society. Even when an environmental tax does not capture the full cost of the externalities, it can have the effect of producing a desired behavioural change, which leads to a more environmentally friendly action at a lower cost than costs arising from obligations imposed by traditional regulatory means.[155]

[151] Ezcurra, 2016, p. 200.
[152] Kingston, 2012, p. 49-51.
[153] Green paper on market-based instruments for environment and related policy purposes, COM(2007) 140 final, p.3.
[154] Opinion of AG Jacobs in C-126/01, *GEMO SA*, ECLI:EU:C:2002:273, para. 66.
[155] Milne, 2017. See also Pigou, 1932.

Environmental taxes are thus a feasible environmental policy instrument which can provide incentives for technological innovation and emissions reductions. In fact, the EU regards environmental taxes as one of the preferred instruments for addressing climate change[156], and they also appear to be less distorting towards economic behaviour than labour and corporate taxes.[157] In addition, the use of MBI is more easily reconciled with the logic of the market economy than imposing obligations by means of regulation.[158] On the other hand, the idea of putting a price on pollution and therefore giving the right to pollute on a given price has been criticised, as the potentially harmful effects on the environment should primarily be prevented.[159] In addition, MBI appear to be beneficial to the environment only beyond a certain threshold; below the threshold, their effect is limited.[160] Therefore, the utilisation of MBI alone is insufficient for attaining the climate targets, as environmental considerations are not inherent in the logic of the market. In fact, taxation appears to work best when there is already a cleaner option to which undertakings or individuals can switch to.[161]

The assessment of whether a particular measure in fact promotes environmental protection is particularly challenging with regard to aid in the form of reductions in or exemptions from environmental taxes, which belong to the category of aid for the protection of the environment, even though they are indeed reliefs from the applicable environmental tax. This is because while such advantages may adversely impact the attainment of the environmental objective in question, they may be needed if the beneficiaries would otherwise be placed at such a competitive disadvantage that it would not be feasible to introduce the environmental tax in the first place.[162] Hence, they play a role in the transition to a greener economy by providing flexibility to Member States and allowing for adjustment periods in the process.[163]

Therefore, tax exemptions or reductions may facilitate a higher level of environmental taxes in general. However, in order to be permissible under Article 107 TFEU, they must always at least indirectly contribute to a higher level of environmental protection and never

[156] See, for instance, Communication from the Commission, Rio+20: Towards the green economy and better governance COM (2011)363 final, p. 8, Communication from the Commission, A Clean Planet for all: A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy, COM(2018)773 final, COM(2018)773 final, p. 18. See also Krupnick and Parry, 2012, p. 1-2, 22-23.
[157] EEA Report No 17/2016, Environmental taxation and EU environmental policies, p. 5.
[158] Kingston, 2012, p. 53.
[159] See Chapter 2.2.2.
[160] Aydin et. al, 2018, p. 2415.
[161] Kingston, 2012, p. 56-57.
[162] EEAG, Section 3.7.1. para. 167.
[163] See, for instance, EEAG recital 9, Section 3.7.3.

undermine the overall objective of the environmental tax.[164] For instance, as demonstrated by *Nicolaides*, when high taxes on all polluting activities in a particular field are not feasible, granting tax reliefs to some industries should in principle enable the levying of higher counter-balancing taxes on other industries with the outcome that the overall level of environmental protection is as high as it would have been in a situation where the tax in question would have been applied uniformly.[165] The rationale of tax advantages is thus often the reconciliation of economic or environmental objectives by aiming at maintaining the competitiveness of the undertakings concerned[166], incentivising environmentally-friendly action, as well as encouraging the Member States to establish environmental tax schemes at an efficient rate by allowing them to justifiably grant exemptions when need be.[167] Sometimes other objectives such as those relating to social policy may be the justification for the measure, too.[168] Nevertheless, the assessment of the link between the contribution to environmental protection and the loss of competitiveness must be done carefully in order to ensure that the measure in question does not distort competition without promoting a legitimate interest.[169] Otherwise, the resulting welfare losses are not compensated by an improvement in the level of environmental protection.[170]

In addition to aid in the form of reductions in or exemptions from environmental taxes, sometimes the environmental tax itself may constitute State aid when it is fixed in a manner which leads to discriminatory effects[171], as discussed later below. This may be the case when the tax is imposed only on some undertakings in a comparable factual and legal situation, which may be considered as relieving the undertakings not subject to the tax from the burden they would normally have to bear.[172]

[164] EEAG, Section 3.7.1. para. 168.
[165] Nicolaides, 2015, p. 577.
[166] Terra – Wattel, 2012, p. 537.
[167] De Sadeleer, 2014, p. 447.
[168] See, for instance, Energy Taxation Directive 2003/96/EC (ETD), recital 28.
[169] Maillo, 2017, p. 6.
[170] Rauhanen, 2017, p. 139.
[171] See, for instance, T-210/02, *British Aggregates v Commission*, ECLI:EU:T:2006:253.
[172] C-53/00, *Ferring*, ECLI:EU:C:2001:627, para. 20, Opinion of AG Szpunar in C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, ECLI:EU:C:2015:51, para. 69.

3.2.3. The role of the EEAG

The purpose of Commission Guidelines such as those on State aid for environmental protection and energy 2014-2020 (EEAG) is to promote the predictability and transparency of its decision-making as well as to draw boundaries to its discretion.[173] The EEAG lays down conditions under which environmental aid may be deemed compatible with the internal market under Article 107(3)(c) TFEU after being classified as prohibited State aid under Article 107(1) TFEU. However, as the focus of this dissertation is in the assessment of the cumulative criteria laid down in Article 107(1) TFEU, the compatibility assessment under Article 107(3)(c) will be only briefly discussed later in Chapter 5 below. It should be noted that the EEAG also lays down the applicable notification thresholds, although they do not apply to fiscal aid in the form of reductions in or exemptions from environmental taxes regulated in Section 3.7. thereof. Instead, aid not covered by Section 3.7 is be subject to an individual assessment if the thresholds in that Section are exceeded.[174] As already mentioned above, the Guidelines will be revised with the aim of better reflecting the objectives of the European Green Deal.[175]

3.3. When Article 107 TFEU does not apply

3.3.1. The cumulative criteria are not met

Before studying which national fiscal measures in the field of environmental policy fall within the scope of State aid control, it is appropriate to clarify when they do not. The first of such cases is an obvious one: State aid rules do not apply when the measure at issue does not meet all the cumulative criteria laid down in Article 107(1) TFEU, according to which: "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*". It is settled case-law that the categorisation as 'State

[173] De Cecco, 2013, p. 48-49.
[174] EEAG, Section 2, paras. 20-21.
[175] See, Communication from the Commission, Sustainable Europe Investment Plan, COM(2020) 21 final, p. 12, Communication from the Commission concerning the prolongation and the amendments of, inter alia, the Guidelines on State Aid for Environmental Protection and Energy 2014-2020, C/2020/4355, OJ C 224, 8.7.2020, p. 2–4.

aid' within the meaning of Article 107(1) TFEU requires all the four conditions to be satisfied.[176] The criteria may be broken down as follows: there must be 1) an intervention by the State or through State resources, which 2) confers a selective advantage on the recipient, 3) is liable to affect trade between Member States, and 4) is liable to distort or threaten to distort competition.[177] For the purposes of this dissertation, the assessment of the latter two points will be combined, and the assessment of the second point is split into two.

The criteria are applied based on objective factors[178], which means that national measures are assessed on grounds of their effects, not their objectives or the forms they take[179], as already mentioned above. The concept of State aid is therefore broad and encompasses not only subsidies but also positive benefits in various forms, which one way or another release undertakings from costs they would normally bear and are thus similar to subsidies in character and effect[180], including fiscal measures such tax exemptions and reductions.[181] However, even if one of the four conditions discussed below is not met, Article 107(1) TFEU does not apply.

The prohibition laid down in Article 107(1) TFEU concerns only the activities of undertakings, which have been broadly defined as entities engaged in an economic activity, regardless of their legal status or the way in which they are financed. It is the nature of the activity which matters.[182] For instance, an entity that is formally a part of public administration may be regarded as an undertaking if it carries out an economic activity.[183] Hence, State aid rules also apply to the activities of the State when it engages in economic activity.[184]

[176] C-706/17, *Achema and Others*, ECLI:EU:C:2019:407, para. 46 and case-law cited.
[177] See, for instance, Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, para. 58, C-438/16 P, *Commission v France and IFP Énergies nouvelles*, ECLI:EU:C:2018:737, para. 108, C-203/16 P, *Andres (faillite Heitkamp BauHolding) v Commission*, ECLI:EU:C:2018:505, para. 82, C-150/16, *Fondul Proprietatea*, ECLI:EU:C:2017:388, para. 13, C-20/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981, para. 53, C-39/14, *BVVG*, ECLI:EU:C:2015:470, para. 24.
[178] C-83/98 P, *France v Ladbroke Racing and Commission*, ECLI:EU:C:2000:248, para. 25.
[179] Bacon, 2013, p. 20-22, see also, Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, para. 64, C-452/10 P, *BNP Paribas and BNL v Commission*, ECLI:EU:C:2012:366, para. 100.
[180] See, for instance, C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, ECLI:EU:C:2001:598, para. 38, C-78/08 to C-80/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, para. 45; C-106/09 P and C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, para. 71, C-518/13, *Eventech*, ECLI:EU:C:2015:9, para. 33.
[181] C-78/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, paras. 45-46. See also Bacon, 2013, p. 23.
[182] C-262/18 P, *Commission v Dôvera zdravotná poist'ovňa*, ECLI:EU:C:2020:450, paras. 27-29, Joined Cases C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori v Commission*, ECLI:EU:C:2018:873, para. 103 and case-law cited.
[183] See Commission Notice on the Notion of State aid, 2016, Section 2.1.
[184] C-118/85, *Commission v Italy*, ECLI:EU:C:1987:283, paras. 7-8, C-343/95, *Calì & Figli v Servizi Ecologici Porto di Genova*, ECLI:EU:C:1997:160, paras. 16-18.

Consequently, the basic rule is that if a public entity exercises an economic activity which can be separated from the exercise of public powers, it acts as an undertaking in relation to that activity and may be subject to State aid control in that regard.[185]

The differentiation between the exercise of public powers and economic activity is done on a case-by-case basis by assessing whether those activities, by their nature, aim and the rules to which they are subject to, have an economic character which justifies the application of competition rules.[186] For instance, the GC has held that whereas the control and supervision of air space are typically the activities of a public authority, using an instrument which increases the landing accuracy of an aircraft and thus allows a safer landing plays no part in this control and thus contributes to the delivery of the services offered in a competitive context and thus forms a part of an economic activity.[187] On the other hand, the fact that the entity concerned may be able to seek profits and is engaged in a certain amount of competition does not automatically mean that it engages in economic activity, as the assessment is done based on all the elements characterising its activity.[188]

Another question relating to indirect environmental taxes such as VAT and excise duties, which are meant to tax consumption, is whether exemptions or reductions therefrom can be considered granting an advantage to an undertaking if the direct beneficiary of the measure is the consumer.[189] However, it appears that the Commission generally considers that such scenarios result into an indirect advantage conferred upon undertakings providing goods or services subject to the reduction, as reduced prices are likely to increase their demand.[190] The fact that the direct recipient of the advantage is a natural person does not prevent its classification as State aid.[191]

[185] See, for instance, T-53/16, *Ryanair and Airport Marketing Services v Commission*, ECLI:EU:T:2018:943, para. 107, C-74/16, *Congregación de Escuelas Pías Provincia Betania*, ECLI:EU:C:2017:496, para. 44.
[186] C-687/17 P, *Aanbestedingskalender and Others v Commission*, ECLI:EU:C:2019:932, paras. 15-16.
[187] T-818/14, *BSCA v Commission*, ECLI:EU:T:2018:33, paras. 99-106, 117.
[188] C-262/18 P, *Commission v Dôvera zdravotná poist'ovňa*, ECLI:EU:C:2020:450, paras. 37-39, 47-50 and case-law cited. The ECJ set aside the judgement of the GC in T-216/15, *Dôvera zdravotná poist'ovňa v Commission*, ECLI:EU:T:2018:64.
[189] For discussion, see Englisch, 2013, p. 9, 12-14.
[190] See Commission Notice on the Notion of State aid, 2016, Section. 4.3 paras. 115-116.
[191] C-403/10 P, *Mediaset v Commission*, ECLI:EU:C:2011:533, para. 81.

3.3.2. The discharge of services of general economic interest

Under Article 106(2) TFEU, both public and private undertakings entrusted with the operation of services of general economic interest (SGEI) remain subject to the competition rules contained in the Treaties, in so far as their application does not obstruct the performance of the tasks assigned to them.[192] In order to qualify as SGEI, the service at issue cannot be satisfactorily provided by the market and must be addressed to citizens or be in the interest of society.[193] It is established case-law that State compensation for the provision of SGEI is exempted from State aid control when it fulfils the so-called *Altmark* criteria[194], although it is also possible that a measure which does not meet the *Altmark* criteria is nevertheless considered compatible with the internal market on grounds of Article 106(2) TFEU.[195]

Services of this kind relate in particular to areas of social security, health care, and education[196], but in some instances it is well-founded to include certain services in the field of energy into this category, too, for instance when they aim at ensuring the security of supply.[197] It has been argued that a broad reading of Article 106(2) TFEU could also encompass environmental protection services[198], but examples of such cases have not yet materialised. One may wonder whether services, which are in fact detrimental to the environment, may be considered as services in the interest of the society light of the prevailing legislative framework and ecological realities. It appears that the answer is positive, in fact the GC has stated that the Commission has no obligation to assess the compatibility of aid schemes which do not pursue environmental protection objectives with EU environmental protection rules[199], as discussed in Chapter 5 below.

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[192] It should be noted that State aid to public services in the field of transport, which is critical in terms of the emissions reductions targets, is assessed under 93 TFEU, as it is *lex specialis* in relation to Article 106(2) TFEU. See Bovis et. al., 2016, p. 86.
[193] Verouden and Stehmann, 2016, p. 87.
[194] C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, ECLI:EU:C:2003:415, paras. 89-93. Accordingly, Article 107(1) TFEU does not apply if the compensation is for a clearly defined SGEI service, the terms of compensation are established in advance in a transparent and objective manner, the compensation does not exceed what is necessary to cover the costs incurred, also considering a reasonable profit, and when not chosen by public tender, the level of compensation must be determined on the basis of an analysis of the costs of a typical well-run company. See also De Hauteclocque et. al,, 2018, p. 284-285, Bovis et. al., 2016, p. 92-94.
[195] T-354/05, *TF1 v Commission*, ECLI:EU:T:2009:66, para. 140. See also Nowag, 2017, p. 95-96.
[196] See Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, 2012/C 8/02.
[197] De Hauteclocque et. al., 2018, p. 277. See for instance case T-57/11, *Castelnou Energía v Commission*, ECLI:EU:T:2014:102.
[198] Nowag, 2017, p. 96-97.
[199] T-57/11, *Castelnou Energía v Commission*, ECLI:EU:T:2014:1021, para. 187.

3.3.3. Block Exemption Regulation and the Energy Taxation Directive

The Commission Block Exemption Regulation 651/2014/EU (GBER)[200] exempts certain categories of aid from the notification obligation when they are considered compatible with the internal market under Article 107(3) TFEU under certain conditions.[201] Section 7 thereof addresses certain categories of aid for environmental protection.[202] The categories of aid contained therein are broad, and the regulation therefore lightens the administrative burden of Member States when they wish to pursue certain environmental objectives by means of State aid. However, the specific conditions of application for each type of aid are rather complex, and the application of the GBER is also limited by thresholds prescribed for in Article 4 thereof.

It is important to differentiate between tax measures covered by the GBER and those that are examined under Article 107(1) TFEU and the EEAG, as only the latter are studied in this dissertation. In this context, Article 44 GBER deserves closer examination. Accordingly, aid schemes in the form of reductions in environmental taxes fulfilling the conditions of the ETD shall be compatible with the internal market, provided that the beneficiaries are selected on the basis of transparent and objective criteria and that they pay at least the respective minimum level of taxation set by the ETD. In fact, about three quarters of all GBER measures fall within the scope of Article 44.[203] For the purposes of clarification, the following classification may be used[204]:

1) tax reductions which concern harmonised taxes within the scope of the ETD, and which respect the minimum levels laid down therein → assessment based on the GBER;

[200] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1–78.
[201] Article 3 of the GBER.
[202] According to Article 2(101) GBER, environmental protection means '*any action designed to remedy or prevent damage to physical surroundings or natural resources by a beneficiary's own activities, to reduce risk of such damage or to lead to a more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy*'. This broad definition includes measures addressing climate change. See Maillo, 2017, p. 5.
[203] State aid Scoreboard, 2019, p. 41-43.
[204] Sandberg, 2018, p. 79-80. It should be noted that as laid down in Article 26(2) ETD, also tax measures under the ETD may constitute State aid. This is the case when they are not within the scope of the GBER and are granted at the discretion of the Member States, based on Articles 5 and 15–17 ETD. In this regard, see Ezcurra, 2016, p. 209.

2) tax reductions covered by another harmonisation directive respecting the thresholds laid down therein → assessment based on the EEAG; notification obligation applies;

3) tax reductions which concern non-harmonised taxes or taxes which do not respect the minimum limits laid down in a harmonisation directive → assessment based on the EEAG; notification obligation applies.

As already mentioned above, the ETD has been criticised for discrepancies, and also the Commission has acknowledged that it contains several inconsistencies which hamper the attainment of the EU's energy, climate and transport objectives.[205] One of such disparities is that not all tax benefits falling within the scope of Article 44 GBER in reality serve objectives of environmental protection.[206]

3.3.4. De Minimis aid and de jure compatible aid

A measure is also exempted from State aid control when it falls within the scope of application of the Commission Regulation 1407/2013/EU on de minimis aid.[207] The de minimis Regulation exempts certain categories of aid which are deemed to have no impact on competition and trade in the internal market from the notification obligation to the Commission under Article 108(3) TFEU, and therefore from the application of Article 107(1) TFEU, too. The regulation applies to aids which are granted over a period of three years to a single undertaking and constitute a maximum of EUR 200 000.[208]

In addition, Article 107(2) lays down three *de jure* derogations to the general prohibition of State aid. Accordingly, a) aid having a social character granted to individual consumers, b) aid to repair the damages caused by natural disasters or exceptional occurrences, and c) aid granted to the economy of certain areas of Germany affected by the division of Germany, shall be compatible with the internal market. The Commission has no margin of discretion

[205] SWD(2019) 329 final. See also COM(2019) 177 final, p.6.
[206] See, for instance, Ezcurra, 2017, p. 17.
[207] Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1–8. There is also a SGEI specific de minimis Regulation (EU) No 360/2012, OJ L 114, 26.4.2012, p. 8–13.
[208] See recital 3 and Article 3 of Regulation (EU) No 1407/2013.

with regard to the compatibility assessment once it has verified that the requirements laid down in the applicable subparagraph are met.[209]

Given all the above, it is not an overstatement to say that the applicable framework for State aid in the field of environmental taxation is complex and somewhat inconsistent.

[209] Ianus et. al., 2016, p. 234-235.

4. THE CUMULATIVE CRITERIA OF ARTICLE 107(1) TFEU

4.1. State origin: Imputability to State and State resources

The first cumulative criterion under Article 107(1) TFEU is that a measure may constitute State aid when it is granted by a Member State or through State resources. Even though the wording of the provision would imply that the two conditions are alternative, they are in fact cumulative.[210] It is settled case-law that State aid control applies when the aid is granted directly or indirectly through State resources *and* is attributable to the State.[211] According to the CJEU, the distinction between the two conditions is intended to bring both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State within that definition.[212]

4.1.1. Imputability to State

It is important to differentiate the role of the State as public authority and as an entity which may engage in economic activities, as imputability to State is assessed differently in these two scenarios. Because this dissertation focuses on fiscal aid measures by which States may pursue environmental policy objectives, the focus will be the first point and the actions of the State as a regulator.

In order to assess whether a measure is imputable to State it is necessary to examine whether public authorities were involved in the adoption of that measure.[213] Quite obviously, measures, such as fiscal measures, which are adopted by means of laws or government resolutions as a rule satisfy this condition.[214] However, this is not the case when the measure

[210] T-351/02, *Deutsche Bahn v Commission*, ECLI:EU:T:2006:104, para. 103. See also Schöning and Ziegler, 2018, p. 17, Bovis et. al., 2016, p. 65.
[211] C-706/17, *Achema and Others*, ECLI:EU:C:2019:407, para. 47, C-262/12, C-329/15, *ENEA*, ECLI:EU:C:2017:671, para. 20, *Vent De Colère and Others*, ECLI:EU:C:2013:851, para. 16, C-126/01, *GEMO SA*, ECLI:EU:C:2003:622, para. 24, C-482/99, *France v Commission*, ECLI:EU:C:2002:294, para. 24.
[212] See, for instance, Joined Cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer*, ECLI:EU:C:1993:97, para. 19, and Case C-379/98, *PreussenElektra*, ECLI:EU:C:2001:160, para. 58, C-677/11, *Doux Élevage and Coopérative agricole UKL-ARREE*, ECLI:EU:C:2013:348, para. 26.
[213] C-262/12, *Vent De Colère and Others*, ECLI:EU:C:2013:851, para. 17, C-329/15, *ENEA*, ECLI:EU:C:2017:671, para. 21, Case C-706/17, *Achema and Others*, ECLI:EU:C:2019:407, para. 48.
[214] Bovis et. al., 2016, p. 71, Bacon, 2013, p. 68. See also C-706/17, *Achema and Others*, ECLI:EU:C:2019:407, para. 49, C-262/12, *Vent De Colère and Others*, ECLI:EU:C:2013:851, paras. 17-18, C(2013) 4424 final, Commission Decision of 18.12.2013 on State aid SA.33995 (2013/C) (ex 2013/NN) –

results from the implementation of an act of EU law which imposes a clear and precise obligation which leaves no margin of discretion to Member States.[215] Therefore, tax advantages forming an integral part of the standard tax system established by an EU directive or regulation should fall outside State aid control. On the other hand, whenever the measure in question is a result of implementation of EU law which entails a margin of discretion, or the measure is permissible under EU law but not required by it, it may be imputable to the State.[216] For instance, measures undertaken on the basis of the Effort Sharing Regulation 2018/842/EU are not within the exemption of implementation of EU law, as it is binding in terms of the objectives to be achieved but not in terms of the means used to achieve them.[217] There is no alterative with this respect; in order to respect both the division of competences between the Member States and the EU as well as the integration principle laid down in Article 11 TFEU, the Member States must be able to decide on the practical execution of the measures needed to attain the targets laid down at EU level in line with their respective economic, environmental and social conditions. On the other hand, this means that State aid control and the associated notification obligation cannot be escaped by arguing that the measure in question is not imputable to the Member State concerned because it has the objective of reducing emissions in line with obligations laid down in EU law.

There are, however, some environmental tax exemptions which result from an EU measure which leaves no margin of discretion, such as Article 14(1)(b) of the ETD, which lays down a harmonised tax exemption for energy products supplied for use as fuel for the purpose of air navigation, which therefore falls outside the scope of State aid control.[218] This has been identified as a significant shortcoming, as kerosene remains one of the only fossil fuels that are untaxed regardless of the environmental impacts of aviation. Consequently, the Commission has taken note of the fact that the current exemption contradicts with the

Germany – Support for renewable electricity and reduced EEG-surcharge for energy-intensive users, para. 81.

[215] C-460/07, *Puffer*, ECLI:EU:C:2009:254, para. 70, T-351/02, *Deutsche Bahn v Commission*, ECLI:EU:T:2006:104, para. 102.

[216] Maqueda and Conte, 2016, p. 253, Englisch, 2013, p. 14-15. See also C-272/12 P, *Commission v Ireland and Others*, ECLI:EU:C:2013:812, paras. 30, 36, C(2009)10745, Commission Decision of 23.12.2009 on State aid SA.25172, NN 63/2009 (ex N 83/2008) – Slovak Republic – Tax advantage applied on electricity, coal and natural gas, para. 32.

[217] Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, OJ L 156, 19.6.2018, p. 26–42.

[218] See Ezcurra, 2016, p. 209.

decarbonisation objectives of both EU transport and climate policy and plans to embark on introducing a tax on kerosene.[219]

4.1.2. State resources

Only advantages granted directly or indirectly through State resources can constitute State aid within the meaning of Article 107(1) TFEU.[220] It is settled case-law that the prohibition of State aid covers both aid granted directly by the State, including its bodies of central, regional and local administration, and aid granted through a public or private entity appointed or established by the State to administer it.[221] Hence, also the resources of public undertakings may be regarded as State resources where the State is capable of directing their use by exercising its dominant influence over such undertakings.[222] However, not all forms of public ownership or control automatically fall under State aid control, but actual exercise of that control must be shown in order to establish imputability.[223] The concept of State is thus broad in the context of Article 107(1) TFEU, and so is the concept of State resources, which covers measures ranging from grants, investments and loans to granting preferential access to a public domain.[224] After explaining the general rules of interpretation of the concept, its application to fiscal measures and actions of the State as a regulator are discussed.

General remarks

The existence of State resources has been interpreted in two ways in the case-law of the CJEU: the functional interpretation covers every transfer of resources that is in some way determined by the State, emphasising the effects of the intervention, whereas the narrower, more literal interpretation necessitates a financial burden on the State budget.[225] The private nature of the funds does not in itself rule out the possibility to classify them as State

[219] Commission Staff Working document, evaluation of the Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, SWD(2019) 329 final, p. 54. See also Parliamentary questions: Introduction of a European Union tax on kerosene, 17.12.2019, available at: https://www.europarl.europa.eu/doceo/document/E-9-2019-004459_EN.html.
[220] C-82/77, *Van Tiggele*, ECLI:EU:C:1978:10, paras. 25-26.
[221] Raitio, 2016, p. 604-606. See also C-78/76, *Steinike & Weinlig*, ECLI:EU:C:1977:52, para. 21, C-262/12, *Vent De Colère and Others*, ECLI:EU:C:2013:851, para. 20, C-329/15, *ENEA*, ECLI:EU:C:2017:671, para. 23 and C-706/17, *Achema and Others*, ECLI:EU:C:2019:407, para. 50.
[222] C-329/15, *ENEA*, ECLI:EU:C:2017:671, para. 31 and case-law cited.
[223] Bovis et. al., 2016, p. 71, C-482/99, *France v Commission*, ECLI:EU:C:2002:294, para. 52.
[224] Bovis et. al., 2016, p. 68-69. See also Commission Notice on the Notion of State Aid, 2016, point. 3.2.1.
[225] Iliopoulos, 2018, p. 20, Bacon, 2013, p. 61-62.

resources, as also the degree of intervention of the public authority in the definition of the measure in question and its financing methods matters.[226] What is important is whether the measure entails a burden on public resources either in the form of expenditure or reduced revenue[227], or if the funds in question are under public control and available to the competent national authorities.[228]

The CJEU has sometimes relied on the existence of State control, sometimes on the burden on State budget, and sometimes both in its reasoning. It appears that since the ECJ's landmark judgement in case *PreussenElektra*, the interpretation of the condition has been more literal as its fulfilment has as a rule required a direct or indirect effect on State budget.[229] In this judgement, the ECJ held that an obligation imposed by a Member State on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any transfer of State resources to undertakings which produced that type of electricity.[230] The rationale is to exclude the consequences which result from an inherent feature of a legislative provision from the scrutiny under Article 107 TFEU.[231]

The ruling has however been subject to criticism due to its formalism, as it may in principle allow Member States to circumvent State aid control by imposing regulatory obligations which transfer the financial burden entirely on private parties but nevertheless affect the market.[232] On the other hand, necessitating a transfer of State resources *stricto sensu* could be more in line with the division of competences between the EU and the Member States, and also allow for more flexibility in the design of regulatory measures aimed at reaching

[226] T-139/09, *France v Commission*, ECLI:EU:T:2012:496, paras 63-64. See also C(2018) 3166 final, Commission Decision of 28.5.2018 on aid scheme SA.34045 (2013/c) (ex 2012/NN) implemented by Germany for baseload consumers under Paragraph 19 StromNEV, para. 126.
[227] Opinion of AG Jacobs in C-379/98, *PreussenElektra*, ECLI:EU:C:2000:585, para. 116-117, Joined Cases C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, ECLI:EU:C:2013:175, para. 99.
[228] C-329/15, *ENEA*, ECLI:EU:C:2017:671, para. 25, C-677/11, *Doux Élevage and Coopérative agricole UKL-ARREE*, ECLI:EU:C:2013:348, para. 35, C-328/99, *Italy and SIM 2 Multimedia v Commission*, ECLI:EU:C:2003:252, para. 33.
[229] Raitio, 2016, p. 606-611. A similar narrow approach has also been applied in cases such as T-182/10, *Aiscat v Commission*, ECLI:EU:T:2013:9, C-222/07, *UTECA*, ECLI:EU:C:2009:124 and C-518/13, *Eventech*, ECLI:EU:C:2015:9.
[230] See Case C-379/98, *PreussenElektr*a, ECLI:EU:C:2001:160, paras. 58-60.
[231] Ibid, para. 62 and case-law cited.
[232] Bovis et. al., 2016, p. 66, Talus, 2013, p. 142.

environmental objectives.[233] Nevertheless, in its more recent case-law, the ECJ has not always necessitated an actual effect on State budget for concluding that State resources are involved. Instead, it appears that the level of intervention and control of the public authorities over the funds in question is another determining factor in the assessment of State resources within the meaning of Article 107(1) TFEU.[234]

In fact, the prevailing rule is that regulation which foresees financial redistribution from one private entity to another without any involvement of the State does not entail a transfer of State resources, but a transfer of State resources is present if the funds transit through a public or private entity designated by the State with a view of administrating the aid.[235] Hence, the origin of the resources is not relevant provided that they come under public control and are available to the national authorities before being transferred to the beneficiaries.[236] For instance, funds financed through compulsory charges imposed by legislation and used in accordance with it may be regarded as State resources even if they are managed by entities separate from the public authorities, if a public body acts as an intermediary at some stage of the process.[237] On the other hand, State resources are not present when an entity is not appointed by the State to manage a State resource, but has recourse to its own financial resources when complying with obligations imposed by the State. This is the case when the extra costs incurred cannot be passed on entirely to end users and are not financed by a compulsory contribution imposed by the State or by a full offset mechanism.[238] Therefore, the mere fact that the advantage is not financed from the State budget as such is not sufficient to exclude that State resources are involved.[239] For instance, in case *Achema and Others*, the

[233] See Opinion of AG Maduro in C-237/04, *Enirisorse*, ECLI:EU:C:2006:21, paras. 45-50, where he suggests that the selectivity test would be better in identifying the measures which should fall within the prohibition of State aid under Article 107(1) TFEU instead of limiting the scope of the State resources criterion to those affecting State budget, as it would ensure that only legislative measures which result in preferential treatment fall within State aid control.
[234] Maqueda and Conte, 2016, p. 221-224.
[235] C-706/17, *Achema and Others*, ECLI:EU:C:2019:407, para. 52, 70, C-262/12, *Vent De Colère and Others*, ECLI:EU:C:2013:85, para. 19, 35, and C-206/06, *Essent Netwerk Noord and Others*, ECLI:EU:C:2008:413, para. 74.
[236] C-206/06, *Essent Netwerk Noord and Others*, ECLI:EU:C:2008:413, para. 70. See also C-262/12, *Vent De Colère and Others*, ECLI:EU:C:2013:851, para. 21, T-25/07, *Iride and Iride Energia v Commission*, ECLI:EU:T:2009:33, paras. 25-28.
[237] See, for instance, C-262/12, *Vent De Colère and Others*, ECLI:EU:C:2013:851, para. 25, C-405/16 P, *Germany v Commission*, ECLI:EU:C:2019:268, para. 58.
[238] C-329/15, *ENEA*, ECLI:EU:C:2017:671, para. 30. See also C(2018) 3166 final, Commission Decision of 28.5.2018 on aid scheme SA.34045 (2013/c) (ex 2012/NN) implemented by Germany for baseload consumers under Paragraph 19 StromNEV, para. 133.
[239] C-482/99, *France v Commission*, ECLI:EU:C:2002:294, para. 36, C-399/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, ECLI:EU:C:2013:175, para. 100, C-262/12, *Vent De Colère and Others*, ECLI:EU:C:2013:851, para. 21, C-329/15, *ENEA*, ECLI:EU:C:2017:671, para. 25. See also C(2018) 3166

ECJ held that a support mechanism for the provision of certain public interest services in the electricity sector involved State resources, since the life cycle of the funds was strictly regulated and they remained under the control of the State, without even mentioning the word 'budget' in its assessment.[240] It may also be noted that a tax can also constitute an integral part of an aid scheme when it is hypothecated to an aid measure under national legislation.[241]

The ECJ has further elaborated the criteria for establishing State control in its ruling in case *Germany v Commission (EEG).* It held that the fact that public authorities exercised dominant influence over the funds in question was not enough to establish State control, because it was not shown that the State was entitled to dispose of those funds or to decide on their allocation. Public monitoring of the action is thus not sufficient if it does not entail control over the funds themselves. The mere fact that the funds at in question are managed in accordance with legislation and for the purposes laid down therein is neither sufficient for establishing State resources.[242] This ruling is welcomed from a policy perspective, as it makes clear that legislative schemes imposed and monitored by the State are not as such under State control as understood in the context of Article 107(1) TFEU. When assessing the effect on State budget, on the other hand, the ECJ has specified that it is necessary to establish a sufficiently direct link between the advantage given and a reduction of the State budget or at least a sufficiently concrete economic risk of a burden on that budget.[243]

Hence, it appears that aid measures escape State aid control when they are administered and collected by private parties which are not under the dominant influence of the State in the sense that the State could affect the use of the funds in question or have resource to them, and when there is no burden or a risk of a burden on State resources. Whenever there is a State-controlled intermediary which also controls the distribution of the funds, they are likely considered to involve State resources.[244]

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final, Commission Decision of 28.5.2018 on aid scheme SA.34045 (2013/c) (ex 2012/NN) implemented by Germany for baseload consumers under Paragraph 19 StromNEV, para. 125.

[240] C-706/17, *Achema and Others*, ECLI:EU:C:2019:407, para. 50-55, 64-67.

[241] De Sadeleer, 2014, p. 452. See, inter alia, C-449/14 P, *DTS Distribuidora de Televisión Digital v Commission*, ECLI:EU:C:2016:848, paras. 80-81.

[242] C-405/16 P, *Germany v Commission*, ECLI:EU:C:2019:268, paras. 74-80. See also T-47/15, *Germany v Commission*, ECLI:EU:T:2016:281.

[243] See, inter alia, C-518/13, *Eventech*, ECLI:EU:C:2015:9, para. 34 and case-law cited.

[244] Sandberg, 2018, p. 78. See also C-677/11, *Doux Élevage and Coopérative agricole UKL-ARREE*, ECLI:EU:C:2013:348, para. 32.

Fiscal measures

The ECJ has consistently held that the concept of aid embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect.[245] This is particularly the case with tax advantages, which do not entail any direct expenditure of State resources, but which do entail a loss of revenue that would otherwise have accrued and may place the recipients of the aid in a more favourable position than other taxpayers.[246]

Therefore, tax exemptions or reductions[247] from or asymmetrical application[248] of environmental taxes which place some undertakings in a more favourable financial situation than others as a rule qualify as transfer of State resources, as the link between the measure in question and State budget is in principle always present.[249] Also more general measures such as an advantageous determination of tax base may fulfil the State resources criterion under the same logic.[250] This is because even if the measure at issue would be in principle neutral and not even be aimed at raising revenue, it in the end leads to a loss of earnings to the detriment of the State budget[251], if some undertakings in a comparable factual and legal situation are taxed but not others. Hence, tax legislation which grants certain undertakings exclusion from the obligation to pay a particular tax satisfies the criteria of State resources, since it involves the renunciation by the authorities concerned of tax revenue which they would normally have received.[252] It should be noted that the fact that losses incurred on the State due to the measure in question may in some instances be compensated by other incomes

[245] See, for instance, C-672/13, *OTP Bank*, ECLI:EU:C:2015:185, para. 40, C-518/13, *Eventech*, ECLI:EU:C:2015:9, para. 33, Joined cases C-106/09 P and C-107/09 P., *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, para. 71, C-237/04, *Enirisorse*, ECLI:EU:C:2006:197, para. 42, C-387/92, *Banco Exterior de España v Ayuntamiento de Valencia*, ECLI:EU:C:1994:100, para. 13.
[246] C-20/15 P, C*ommission v World Duty Free Group*, ECLI:EU:C:2016:981, para. 56, Terra-Wattel, 2012, p. 244.
[247] C-78/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, para. 46, C-222/04, *Cassa di Risparmio di Firenze and Others*, ECLI:EU:C:2006:8, para. 132, C-66/02, *Italy v Commission*, ECLI:EU:C:2005:768, para. 78.
[248] See, for instance, C-53/00, *Ferring*, ECLI:EU:C:2001:627, para. 20.
[249] Wiesbrock, 2015, p. 80, Bacon, 2013, p. 66-67.
[250] Bovis et. al., 2016, p. 69.
[251] See, for instance, C-159/01, *Netherlands v Commission*, ECLI:EU:C:2004:246, paras. 51-52.
[252] C-169/08, *Presidente del Consiglio dei Ministri*, ECLI:EU:C:2009:420, para. 57.

indirectly resulting from that measure does not prevent the fulfilment of the State resources criterion.[253]

State as regulator

As may be concluded from above, the leeway Member States enjoy in the design of MBI falling outside State aid control is rather limited, although some room for manoeuvre exists. The *NoX* judgement serves as a illustrative example with this respect to the stricter approach, where the ECJ held that an emissions trading scheme involved State resources, because the tradable emissions allowances therein resulted from emissions standards laid down by the State free of charge. The logic is the same as already explained – the possibility of trading those allowances entailed market value, and granting them to undertakings free of charge instead of selling or auctioning them could be equalised to a loss of State revenue.[254] The ECJ expressly stated that "*foregoing of resources cannot be considered as 'inherent' in any instrument designed to regulate emissions of atmospheric pollutants by an emission allowance trading scheme*," because when the State has recourse to those instruments, it also has a choice on how to allocate those allowances.[255]

However, recent jurisprudence of the ECJ may open room for a more flexible approach. *Nicolaides* has argued that the ECJ's judgement in *Eventech*, which concerned privileged access to public infrastructure (the use of bus lanes by London black taxis but not mini cabs), would have confirmed that when States act as regulator, they in fact do not have to auction rights which have economic value nor necessarily even charge any fees, as long as its justified on grounds of the public policy objective in question.[256] This more permissive approach in terms of justifying the loss of State revenue could be feasible in terms of environmental cases, as drafting regulatory measures which entail foregoing State revenue is inevitable in order to reach the binding climate policy targets. However, this would not mean that State aid control would seize to apply, but that the criterion of State resources would not necessarily be fulfilled in case the loss of revenue was deemed justified.

[253] Ibid., paras. 55-58, Kingston, 2012, p. 392.
[254] C-279/08 P, *Commission v Netherlands*, ECLI:EU:C:2011:551, para. 107.
[255] Ibid., para. 111.
[256] Nicolaides, 2018, p. 7. See also C-518/13, *Eventech*, ECLI:EU:C:2015:9.

Importantly, not all instances were State foregoes revenue due to a legislative choice qualify as State aid under the current framework, either. This may be the case when it is established that the State acts as a regulator which pursues public policy objectives by making the selection process of the undertakings concerned subject to qualitative criteria, drafted in line with the objective in question and established *ex ante*. When the State acts as a regulator, it can thus decide legitimately not to maximise its revenues which it could otherwise have received without falling under the scope of State aid rules, provided that all the undertakings concerned are treated in line with the principle of non-discrimination, and that there is an inherent link between achieving the regulatory purpose and the foregoing of revenue. In doing so, it acts in a so-called genuinely regulatory capacity.[257]

This is what differentiates between State as regulator and State as a market operator – regulatory actions do not need to aim at the maximation of revenue and thus the market operator principle is not applicable in this context. What matters is whether State foregoes revenue, but as stated, that fact alone is not necessarily sufficient to conclude that the measure entails State resources. In line with the ECJ's judgement in case *Eventech*: "*the identification of the objective pursued is, in principle, a matter within the prerogative of the competent national public authorities alone and they must have a degree of discretion both as regards whether it is necessary, in order to achieve the regulatory objective pursued, to forgo possible revenue and also as regards how the appropriate criteria for the granting of the right*."[258]

Of course, some regulatory environmental measures may completely fall outside State aid control, too. In fact, the axiom is that generally applicable regulations do not include the use of State resources.[259] However, whenever a regulatory measure is under the scrutiny of Article 107(1) TFEU, it appears established case-law that the (environmental) objective of that measure plays no role in this assessment.[260] As mentioned before, the ECJ has emphasised that Article 107(1) TFEU defines State interventions on the basis of their effects and independently of the techniques used. Nevertheless, an indirect negative effect on State revenues

[257] Commission Notice on the Notion of State aid, 2016, Section. 3.2.1 para 54. See also C-518/13, *Eventech*, ECLI:EU:C:2015:9, paras. 47-48, Opinion of AG Wahl in C-518/13, *Eventech*, ECLI:EU:C:2014:2239, para. 32, C(2017) 6963 final, Commission Decision of 23.10.2017 on State Aid SA.42028 (2017/NN) – Finland Alleged illegal State aid awarded to Yliopiston Apteekki Oy (UHP), para. 32.
[258] C-518/13, *Eventech*, ECLI:EU:C:2015:9, para. 49, C(2017) 6963 final, Commission Decision of 23.10.2017 on State Aid SA.42028 (2017/NN) – Finland Alleged illegal State aid awarded to Yliopiston Apteekki Oy (UHP), para. 34.
[259] Nicolaides, 2018. p. 3.
[260] Nowag, 2017, p. 104-105.

stemming from regulatory measures does not constitute a transfer of State resources where it is an inherent feature of the regulatory measure in question.[261] The link between taxation and State budget is a rather obvious one and hence the State resources criterion is rarely questioned in cases concerning fiscal aid for environmental protection. Instead, selectivity is the decisive criterion for determining the existence State aid in these cases.

4.2. Selectivity

The issue of selectivity represents the most important and controversial criterion for the assessment of fiscal State aid under Article 107(1) TFEU, as it raises complex issues both with respect to its interpretation and the limits of national regulatory autonomy in the fiscal domain.[262] It is often the decisive criterion in the classification of a fiscal measure as State aid, as the other criteria laid down in Article 107(1) TFEU are almost always satisfied in these cases.[263] A prominent issue is that the notion of material selectivity has been interpreted broadly in the case-law of the CJEU, due to which there have been few tax measures escaping the classification as State aid under 107(1) TFEU and thus the notification obligation laid down in Article 108 TFEU.[264] In addition, too broad an understanding of the selectivity criterion may risk the division of competences between the Member States and the EU.[265]

The assessment of selectivity requires the determination of whether, under a particular legal regime, a national measure is such as to *favour certain undertakings or the production of certain goods over other undertakings which are in a comparable factual and legal situation in the light of the objective pursued* by that regime, and who accordingly suffer different treatment which can be classified as discriminatory.[266] The aim is to exclude general regulatory measures which apply equally to all undertakings in all economic sectors in a Member

[261] C-379/98, *PreussenElektra*, ECLI:EU:C:2001:160, para. 62.
[262] See, inter alia, De Cecco, 2013, p. 97, Bovis et. al., 2016, p. 132, Buendia Sierra, 2018, p. 85.
[263] Opinion of AG Kokott in C-66/14, *Finanzamt Linz*, ECLI:EU:C:2015:242, para. 114.
[264] See, for instance, Bartosch, 2011, p. 178-180, p. 189, Nicolaides, 2017, p. 72.
[265] Opinion of AG Kokott in C-66/14, *Finanzamt Linz*, ECLI:EU:C:2015:242, para. 113.
[266] See, inter alia, Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, para. 60, C-233/16, *ANGED*, ECLI:EU:C:2018:280, para. 38, C-20/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981, para. 54, C-518/13, *Eventech*, ECLI:EU:C:2015:9, paras. 53-55, C-403/10 P, *Mediaset v Commission*, ECLI:EU:C:2011:533, para. 36, Joined cases C-106/09 P and C-107/09 P., *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, para. 75, C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:757, para. 82, , C-88/03, *Portugal v Commission*, ECLI:EU:C:2006:511, para. 54, C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, ECLI:EU:C:2001:598, para. 41.

State, such as most nation-wide fiscal measures, from State aid control.[267] Hence, general regulative measures which do not favour certain undertakings over others should fall outside the scope of Article 107(1) TFEU, even if they were in principle able to have distortive effects on competition. Nevertheless, fiscal measures and even fiscal systems which have seemed general by nature have often been considered selective in the case-law of the CJEU[268], and the definition of general measures in this context is narrow; neither the number of eligible undertakings nor the diversity or size of the sectors to which those undertakings belong provide any grounds for concluding that a measure is a general means of economic policy.[269] Hence, the number of beneficiaries does not matter – in principle, a measure may be selective even if it concerns a whole economic sector.[270] The difficulty is that tax measures typically have, in addition to the general goals such as the collection of State revenue, both macroeconomic aims (addressing economy-wide phenomena) and micro-economic aims (addressing a specific industry or activity), and only the former may be linked with the State's general economic policy, whereas the latter is linked with other policy objectives such as environmental ones and is thus linked with selectivity.[271]

It has been argued that the CJEU's strict adherence to the effects-based approach means that there are in fact very few scenarios where a tax measure may fall outside the scope of Article 107 TFEU, and therefore the interpretation of the selectivity criterion also manifests itself as a political battle between the Member States and the Commission about the scope of State aid control in the fiscal domain.[272] Perhaps due to this critique, the ECJ has clarified some rules of interpretation with respect to the assessment of selectivity which limit the scope of State aid control, such as the fact the assessment of selectivity cannot be presumed on formal grounds but presupposes both familiarity with the content of the applicable provisions and examination of their scope on the basis of existing administrative and judicial practice.[273]

It should be repeated that in addition to measures such as tax exemptions and reductions, a tax itself can be selective when its scope is narrow, as the imposition of a tax only on some

[267] Verouden and Stehmann, 2016, p. 35.
[268] Bovis et. al., 2016, p. 129-130.
[269] C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, ECLI:EU:C:2001:598, para. 48.
[270] C-672/13, *OTP Bank*, ECLI:EU:C:2015:185, para. 49, T-251/11, *Austria v Commission*, ECLI:EU:T:2014:1060, para. 99.
[271] Merola, 2016, p. 535.
[272] Peters, 2019, p. 6.
[273] C-6/12, *P Oy*, ECLI:EU:C:2013:525, para. 20.

of the undertakings in a comparable situation may have the same effect as an exemption from an existing tax.[274] The assessment of selectivity is more simple in cases where a tax exemption is explicitly granted to some undertakings only – the challenge is identifying the selective nature of taxes which appear general but in fact do not apply uniformly to all undertakings.[275] This division between general measures and aid measures is significant, as it is decisive in terms of the room for manoeuvre of Member States in the design of their public policy measures.[276]

As mentioned above, regardless of the fact that fiscal policy falls within the exclusive competence of the Member States, that competence must be exercised in accordance with EU law. Therefore, it is not surprising that the CJEU has consistently held that already the use of discretion which enables national authorities to determine whether or not to include some groups of undertakings in a particular scheme may be considered selective, if the decision criteria are unrelated to the tax system itself, but concern other policy objectives.[277] Instead, the use of discretion may be justified if it is limited to verifying the necessary conditions for the pursuit of the tax objective in question and the criteria are both objective and inherent in the tax system.[278] Selectivity may be material or regional, both of which will be discussed next below.

4.2.1. Material selectivity

According to the Commission, material selectivity is the application of a measure only to certain undertakings or certain sectors of the economy in a Member State. *De jure* selectivity results directly from the legal criteria for granting the measure, which restricts its scope to certain undertakings only, whereas *de facto* selectivity may be established where the formal criteria for the application of the measure are general and objective, but the structure of the

[274] C-53/00, *Ferring*, ECLI:EU:C:2001:627, para. 20, Opinion of AG Szpunar in C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, ECLI:EU:C:2015:51, para. 69. See also Nicolaides, *Can a Tax (rather than a Tax Exemption) Confer a Selective Advantage?*, Lexxion, 2019, available at: https://www.lexxion.eu/en/stateaidpost/can-a-tax-rather-than-a-tax-exemption-confer-a-selective-advantage/.
[275] See, inter alia, Sandberg, 2018, p. 66.
[276] Peters, 2019, p. 10.
[277] See C-6/12, *P Oy*, ECLI:EU:C:2013:525, para. 27, Lang and Zeiler, 2017, p. 98-99. See also Commission Notice on the Notion of State Aid, 2016, Section 5.2.2. para. 124.
[278] C-6/12, P Oy, ECLI:EU:C:2013:525, paras. 24-25, Lang and Zeiler, 2017, p. 98. It is however established case-law that discretion which enables national authorities to determine the beneficiaries or the conditions under which aid is provided cannot be considered general in nature.

measure is such that its effects favour a particular group of undertakings.[279] The latter type of selectivity is usually the one presenting most issues in the assessment of fiscal measures.

The parameter against which material selectivity of fiscal measures is assessed is the national fiscal system – in order to classify a national measure as selective, first the ordinary or 'normal' tax system applicable in the Member State concerned must be identified. Second, it must be demonstrated that the tax measure in question is a derogation from that system in so far as it differentiates between undertakings who are in a comparable factual and legal situation in the light of the objective pursued by the tax system.[280] However, where the Member State concerned is able to demonstrate that that differentiation between undertakings flows from the nature or general structure of the system of which the measures forms a part, it is justified and falls outside the scope of Article 107(1) TFEU.[281] This is the so-called 'three-step test': 1) identifying the system of reference, 2) derogation therefrom, and 3) possible justification.

The 'three-step test' is relatively well-established but its practical implementation is not without problems; several advocate generals have pointed out in their recent opinions that especially the identification of the relevant reference framework is challenging when it comes to legal certainty in particular.[282] It has also been argued that the application of the test shifts the debate on selectivity towards formal matters[283], although the only decisive factor, according to the well-established effects-based approach, should be the effects produced by the measure.[284] On the other hand, it has been acknowledged that some level of legal uncertainty is inherent in the application of the test, which includes the determination of a rule and exception on a case-by-case basis, but that a certain flexibility is necessary in

[279] Commission Notice on the Notion of State aid, 2016, Section 5.2.1 para 121. See also Micheau, 2011, p. 199.
[280] See, inter alia, C-374/17, *A-Brauerei*, ECLI:EU:C:2018:1024 , para. 36, Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, para. 61, C-233/16, *ANGED*, ECLI:EU:C:2018:280, para. 40 and case-law cited.
[281] C-20/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981, para. 58, C-78/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, paras. 64-65 and case-law cited.
[282] Opinion of AG Saugmandsgaard Øe in Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:741, paras. 123, 136-137, Opinion of AG Kokott in Case C-236/16, *ANGED*, ECLI:EU:C:2017:854, para 88, Opinion of AG Wahl in Case C-203/16 P, *Andres (faillite Heitkamp BauHolding) v Commission*, ECLI:EU:C:2017:1017, paras. 98, 100-101.
[283] Opinion of AG Saugmandsgaard Øe in Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:741, para. 85.
[284] C-164/15 P, *Commission v Aer Lingus*, ECLI:EU:C:2016:990, para. 68, Joined cases C-106/09 P and C-107/09 P., *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, para. 87 and case-law cited.

order to ensure the appropriate scope of State aid control with respect to fiscal measures.[285] What is clear is that the rules of application of the test and the interpretation of material selectivity remain ambiguous.[286] For the purposes of clarity, I have chosen to examine each step individually, although they are closely intertwined.

a) Identification of the reference framework

The determination of the reference framework plays a significant role in the assessment of material selectivity, since the very existence of an advantage may be established only when compared with the 'normal' scheme taxation.[287] However, the definition of the concept is ambiguous; it consists of the set of rules that generally apply, based on objective criteria, to all undertakings falling within its scope as defined by its objective. Typically, those rules define the scope of the system, the conditions under which it applies, and the rights and obligations of undertakings subject to it.[288] With respect to taxes, such indicators may be elements such as the chosen tax base, rate, or the taxable event.[289] The characteristics of the undertakings may be decisive, too, as the reference framework can be circumscribed around energy-intensive industries only, for instance. The definition of the reference framework has important practical consequences in terms of the burden of proof as it forms the basis against which the Commission must show that there is a derogation therefrom, after which the Member State concerned may show that the derogation is justified.[290] The reference framework constituting normal taxation against which the comparison assessment is made may be the tax itself[291], the applicable regulation of which the measure forms of a part[292] or the general scheme of which the measure forms a part[293].

It appears that initially the Commission tended to opt for a broad definition of the reference framework and consequently presume of derogation therefrom on formal grounds. However,

[285] Soltész, 2020, p. 24-25.
[286] See, inter alia, Peters, 2019, p. 13, Merola, 2016, p. 539-540, Bovis et al., 2016, p. 143, Micheau, 2015, p. 337-338.
[287] Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, para. 62, C-88/03, *Portugal v Commission*, ECLI:EU:C:2006:511, para. 56.
[288] Commission Notice on the Notion of State Aid, 2016, Section 5.2.3.1. para. 133. See also Joined Cases T-778/16 and T-892/16, *Ireland v Commission*, ECLI:EU:T:2020:338, para. 152.
[289] Commission Notice on the Notion of State Aid, 2016, Section 5.2.3. para. 134.
[290] Piernas Lopez, 2018, p. 277-278, Buendia Sierra, 2018, p. 90-92. See also C-78/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, para. 54 and 64.
[291] T-210/02, *RENV – British Aggregates v Commission*, ECLI:EU:T:2012:110, paras. 49-51.
[292] See, for instance, T-251/11, *Austria v Commission*, ECLI:EU:T:2014:1060, para. 110.
[293] See, for instance, C-173/73, *Italy v. Commission*, ECLI:EU:C:1974:71, para. 15.

since the ECJ's judgement in *Paint Graphos*, establishing selectivity necessitates a more detailed consideration and finding material discrimination between similar situations and not merely an exception to an alleged general rule.[294] Hence, it is not always necessary that a tax measure should derogate from an ordinary tax system in order to be considered selective, but when a derogation is present, it creates a presumption of selectivity at least in terms of individual measures. Instead, when examining a general aid scheme, it is necessary to identify whether the measure in question confers an advantage to the exclusive benefit of certain undertakings only.[295] The regulatory technique used does not matter. For instance, when the objective of a specific provision is to charge profits, it forms a part of the general scheme of taxation the objective of which is the taxation of profits, even though some undertakings would be charged under a different provision than others. Hence, the fact that a specific tax is charged differently between two categories of undertakings does not mean that they could not be in a comparable factual and legal situation in the light of the objective pursued.[296]

General availability test and discrimination test

AG *Saugmandsgaard Øe* has identified two types of tests applied by the ECJ for the definition of the reference framework. The so-called 'general availability test' as applied by the ECJ in its judgement in case *Gibraltar* presupposes that advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid within the meaning of Article 107(1) TFEU.[297] According to this test, all undertakings do not actually have to enjoy the advantage concerned, but they must be able to benefit from it.[298] Even when the measure in question is conceived as a general aid scheme and not as an individual aid measure, it may be selective if it confers that advantage exclusively on certain undertakings or certain sectors of activity.[299]

Subsequently, the ECJ appears to have slightly departed from this test and put emphasis on the so-called 'discrimination test', which presupposes an examination of whether the

[294] Buendia Sierra, 2018, p. 90-92.
[295] Joined Cases T-778/16 and T-892/16, *Ireland v Commission*, ECLI:EU:T:2020:338, para. 148, C-20/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981, para. 76-77, C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para. 60.
[296] Joined Cases T-778/16 and T-892/16, *Ireland v Commission*, ECLI:EU:T:2020:338, para. 161.
[297] Joined cases C-106/09 P and C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, para. 73. See also C-6/12, *P Oy*, ECLI:EU:C:2013:525, para. 18.
[298] Opinion of AG Saugmandsgaard Øe in Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:741, para. 5.
[299] C-270/15 P, *Belgium v Commission*, ECLI:EU:C:2016:489, paras. 49-50 and case-law cited.

measure applies to undertakings in a non-discriminatory manner, in its ruling in case *World Duty Free Group.*[300] Discrimination is established when there is a different treatment of equivalent situations or an equivalent treatment of different situations.[301] Hence, it is not necessary discriminatory to exclude some undertakings from the scope of the measure if they are not in an equivalent situation with those subject to it.[302] In its judgement in *World Duty Free Group*, the ECJ departed from view of the GC, who had held that in order to establish selectivity with regard to measures which are a priori accessible to any undertaking, it is always necessary to identify a particular category of undertakings who are exclusively favoured by the measure.[303] The ECJ noted that such a supplementary requirement for the identification of a particular category of undertakings cannot be derived from its case-law – what matters is whether certain undertakings are excluded from the benefit of an advantage in a manner which constitutes discrimination.[304] With this respect, the ECJ also narrowed the scope of application of the *Gibraltar* judgement, where it had held that selectivity necessitates the identification of a privileged category of undertakings, because in that case there was no derogation from the reference framework unlike in the case at hand.[305]

One may conclude that in line with the *effect utile* of EU law, the ECJ quite consistently emphasises *de facto* selectivity – what matters are the effects of the measure, which may favour certain undertakings, and therefore lead to *de facto* discrimination against undertakings who are in a comparable situation in the light of the objective pursued. This is in line with the effects-based approach, according to which the objective or the regulatory technique by which the system is designed do not matter.[306] It is now established case-law that the examination selectivity of a measure is coextensive with the examination of whether it applies to that set of economic operators in a non-discriminatory manner.[307] Only tax

[300] Opinion of AG Saugmandsgaard Øe in Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:741, para. 6, 61-63, Giraud; Petit, 2017, p. 311-312. See C-20/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981, para. 54, C-524/14 P, *Commission v Hansestadt Lübeck*, ECLI:EU:C:2016:971, para. 53.
[301] Giraud; Petit, 2017, p. 312.
[302] C-20/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981, paras. 59-60, C-417/10, *3M Italia*, ECLI:EU:C:2012:184, para. 42.
[303] T-219/10, *Autogrill España v Commission*, ECLI:EU:T:2014:939, para. 45, T-399/11, *Banco Santander and Santusa v Commission*, ECLI:EU:T:2014:938, para. 49.
[304] C-20/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981, paras. 70-71.
[305] Ibid, paras. 72-73, 78. See also Giraud; Petit, 2017, p. 313.
[306] With regard to regulatory techniques in the design of tax systems, see C-203/16 P, *Andres (faillite Heitkamp BauHolding) v Commission*, ECLI:EU:C:2018:505, paras. 90-92.
[307] C-524/14 P, *Commission v Hansestadt Lübeck*, ECLI:EU:C:2016:971, para. 53.

advantages resulting from a general measure applicable to all economic operators without distinction clearly fall outside the scope of State aid control.[308]

It has been argued that the 'discrimination test' is problematic in terms of both legal certainty and the regulatory autonomy of Member States in fiscal matters. AG *Saugmandsgaard Øe* has pointed out that adherence to it entails an assessment of selectivity *afterwards*, by comparing the situation of undertakings which benefit from the advantage because they chose to adopt the conduct targeted, with the situation of undertakings which do not benefit from it because they have not done so.[309] It may also be argued that this sets the bar for a measure to qualify as selective quite low, especially when the reference framework is defined broadly.[310] However, it may also be argued that this approach is consistent with the nature of fiscal measures, as tax regimes are often introduced by regulation framed in a general manner. Therefore, it is necessary to go beyond the wording of the tax provision in question in order to assess whether or not it confers a selective advantage.[311] In addition, since the judgement in *Paint Graphos*, the reference framework must be determined materially and discrimination assessed both *de jure* and *de facto*, which imposes some limits on its definition – the system of reference should only include undertakings who in fact are in a comparable factual and legal situation. This materially defined reference system is more likely narrower than a formally defined one.[312] Selectivity is not automatically established if a measure applies exclusively to a specific economic sector or a group of undertakings, but it has to have the effect of conferring an advantage on certain undertakings over others.[313]

General tax system or special tax regime

In a more pragmatic and simple manner, one may also argue that the ECJ generally opts between the following types of reference frameworks: the *general tax system* or the *special tax regime*. All undertakings are subject to the general tax system, such as the corporate income tax system, as a result of which any deviation is more easily considered selective.

[308] C-233/16, *ANGED*, ECLI:EU:C:2018:280, para. 39 and case-law cited.
[309] Opinion of AG Saugmandsgaard Øe in C-374/17, *A-Brauerei*, ECLI:EU:C:2018:741, paras. 72-74. See also Nicolaides, 2017, p. 62, 65.
[310] Micheau, 2011, p. 203-204. Similarly, Micheau, 2015, p. 334-335, Soltész, 2020, p. 24-25.
[311] Micheau, 2011, p. 200.
[312] Buendia Sierra, 2018, p. 88, C-78/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550.
[313] C-70/16 P, *Comunidad Autónoma de Galicia and Retegal v Commission*, ECLI:EU:C:2017:1002, para. 61, C-524/14 P, *Commission v Hansestadt Lübeck*, ECLI:EU:C:2016:971, para. 58.

The main objective of the general tax system is to raise revenue, and therefore, exception to its application may only be justified by the guiding principles of the tax system. Hence, there is no room for the consideration of external policy objectives in this context. On the other hand, with respect to special tax regimes, such as taxes on energy consumption, the external objectives of the tax measure in question may be considered in the definition of the reference system.[314] This classification appears to be the one applied by the Commission in the assessment of derogation from the reference framework.[315] It should be noted that the fact that a tax has a budgetary objective cannot preclude its categorisation as a special-purpose levy as such, since every tax pursues a budgetary purpose, too.[316]

The ECJ's judgement in *Kernkraftwerke Lippe-Em* serves an example of a case where the tax itself constituted the reference system. The case concerned a national duty levied on nuclear fuels used for the commercial production of electricity. The applicant had argued that the duty in question was a part of a regime for the taxation of energy sources used to produce electricity or for the taxation of energy sources used to produce electricity not emitting CO_2 emissions. With respect to this framework, different treatment of undertakings could have been shown because energy sources other than nuclear fuel used for the production of electricity were not taxed. However, the ECJ considered that it was not possible to identify a tax regime which has as its objective the taxation of energy sources used to produce electricity or energy sources used to produce electricity which do not contribute to CO_2 emissions.[317] In this regard, the ECJ followed the opinion of AG *Szpunar*, who held that it is not possible to identify a system of reference which would take account of all the possible production processes of electricity (combustion of fossil fuels, nuclear reaction, renewable sources of energy etc.). Therefore, the reference framework cannot be the general system of taxation of electricity, as no such system exists – the duty in question constituted a special tax which could only be applied to the nuclear sector.[318]

The ECJ also took account of the objectives of the measure, which were environmental as the tax revenues were to be used for the rehabilitation of the mining site where radioactive

[314] Piernas Lopez, 2018, p. 278-279.
[315] Commission Notice on the Notion of State Aid, 2016, Section 5.2.3.2. paras. 135-136.
[316] Ezcurra, 2016, p. 216. See also C-82/12, Transportes Jordi Besora, ECLI:EU:C:2014:108, para. 27.
[317] C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, ECLI:EU:C:2015:354, paras. 76-77.
[318] Opinion of AG Szpunar in C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, ECLI:EU:C:2015:51, paras. 70-74.

waste from the use of nuclear fuel was stored. Therefore, as undertakings using other methods to produce electricity do not generate radioactive waste, they were not in a comparable factual and legal situation in the light of the objective pursued by the measure, either. Hence, the duty on the use of nuclear fuel for the commercial production of electricity was not selective and did not constitute State aid.[319]

It appears that the environmental purpose of the tax was drawn from the link between the structure of the tax and the use of revenues for rehabilitating the mining site, which was the reason why the levy was qualified as a special tax under which environmental objectives may be considered. *García* and *Ferreiro Serretargue* argue that this conclusion is in line with the judgement of the ECJ in *Transportes Jordi Besora*: a link between the structure of the tax and the use of the tax revenues has to exist in order to identify the tax as an environmental tax.[320] In this regard, they refer to *Pitrone*, according to whom it is not sufficient that the objective of the tax is to discourage environmentally-harmful action or the use of products harmful to the environment, but the structure of the tax must be specifically designed to attain such an objective. One example of such a design is to establish a direct link between the use of the revenue and the non-budgetary purpose of the protection of the environment.[321] Therefore, whenever tax revenues arising from a special-purpose levy are earmarked for a concrete environmental objective, the tax should not qualify as a State aid under Article 107(1) TFEU, provided that its structure is in line with the objective in question and it would cover all undertakings in a comparable and factual situation in the light of that objective.

García and *Ferreiro Serretargue* argue that this exemption should apply only when the majority of the tax revenue is allocated for environmental purposes. They criticise the ECJ's judgement in *Kernkraftwerke Lippe-Em* with this respect, as the tax revenues of the measure in question were used both for environmental purposes and to cover other expenses, but the ECJ held that the underlying logic of the duty was nevertheless environmental. They therefore promote for a more factual consideration of the distribution of the revenue in order to ensure that the main objective of the measure is indeed environmental. Otherwise, it could be argued that the use of tax revenues for an environmental purpose in any proportion, as

[319] C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, ECLI:EU:C:2015:354, paras. 78-82.
[320] García; Ferreiro Serret, 2016, p. 836-837, C-82/12, *Transportes Jordi Besora*, ECLI:EU:C:2014:108, para. 30.
[321] Pitrone, 2015, p. 64.

long as its structure is tailored to that objective, would be enough to classify the tax as a special-purpose levy.[322] Hence, they promote requiring a link between the structure of the tax and the use of (majority of) the tax revenue for the environmental purpose.

Importantly, however, establishing a direct link between the use of revenue and the structure of the tax is only one way of showing that the tax is specifically designed to attain an environmental objective. According to *Pitrone*, this is also apparent from the judgement in *Transportes Jordi Besora*. Another scenario is when there is a link between the structure of the tax and its incentive effect, which may be sufficient for its categorisation as a special-purpose levy, when the structure of the tax, particularly the taxable item or tax rate, incentivises the desired behaviour.[323] In fact, according to *AG Wahl*, what matters is the non-budgetary purpose of the tax where it is set at a level which discourages or encourages certain behaviour, for instance when its level varies according to the adverse environmental effects of the taxed product or activity. Hence, to the extent that the structure of the tax shows that it serves a specific purpose, the fact that the revenue collected may be put to any use should not preclude its classification as a special-purpose levy.[324]

In my opinion, the application of both lines of interpretation presented above on a case-by-case basis allows the Member States to utilise special-purpose levies in a manner which sets an appropriate balance between the requirements of State aid control and those stemming from Article 11 TFEU and the division of competences. It is difficult to draw arguments from the case-law of the CJEU which would justify the narrower approach, according to which only taxes whose majority revenue would be earmarked for environmental protection purposes could be categorised as special-purpose levies.

It has also been argued that allowing the consideration of environmental objectives with regard to special-purpose levies only may tempt the Member States pursue national policy objectives through special regimes which may be more easily justified rather than through derogations from general tax schemes.[325] This could result in asymmetrical treatment of advantages provided in the context of special taxes and general taxes, and arguably create a bias in favour of special taxes. Hence, AG *Saugmandsgaard Øe* has advocated for the

[322] García; Ferreiro Serret, 2016, p. 837.
[323] Pitrone, 2015, p. 64, C-82/12, *Transportes Jordi Besora*, ECLI:EU:C:2014:108, para. 32.
[324] Opinion of AG Wahl in C-82/12, *Transportes Jordi Besora*, ECLI:EU:C:2013:694, paras. 23-25.
[325] Piernas Lopez, 2018, p. 279.

possibility of considering environmental objectives in the context of general taxes, too. He argues that although mere reliance on a legitimate objective cannot as such exclude a State measure from the scope of Article 107(1) TFEU, it should be possible to rely on *any legitimate objective* in assessment of the reference framework and comparability in particular.[326]

The suggestion of AG *Saugmandsgaard Øe* has potential for the promotion of the application of the integration principle in a more coherent manner. It could also bring balance into the application of State aid rules, where currently the majority of tax measures are considered selective, by allowing Member States to define the applicable reference framework for any type of tax measure on the basis of its environmental objectives, which might then escape State aid control if deemed well suited to achieve the objective in question, and all the under takings in a comparable situation in the light of the objective are subject to the measure. However, should the consideration of environmental objectives in the context of general measures be stretching it too far, in my opinion the fear of *mala fide* application of the exemption provided under special-purpose levies may nonetheless be largely eliminated on account of the requirements relating to the link between the structure of the tax and the its incentive effect or use of revenue.

Finally, it has been argued that save for manifest errors, the reference framework as defined by the national legislator should be accepted as starting point, and the Commission and the CJEU could depart from it only when necessary to avoid abuses of the Member States' leeway, notably through the use of regulatory techniques.[327] This would naturally respect the fiscal autonomy of the Member States and again allow for more flexibility in the use of fiscal tools for the attainment of environmental objectives without jeopardising the objectives of State aid control. Nevertheless, the identification of the reference framework is not decisive but only the first of the three steps – what matters in the end is the examination of the difference in treatment in the light of the objective pursued.[328]

[326] Opinion of AG Saugmandsgaard Øe in Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:741, paras. 152-158. For arguments against allowing the consideration of external policy objectives in the case of derogations from general systems (mainly the effects-based approach and the objective definition of the concept of State aid), see Piernas Lopez, 2018, p. 279-280.
[327] Piernas Lopez, 2018, p. 278.
[328] Opinion of AG Kokott in Case C-236/16, *ANGED*, ECLI:EU:C:2017:854, para. 88, C-20/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981, paras. 54, 67 and 74.

b) Derogation – differentiation of undertakings which are in a comparable factual and legal situation in the light of the objective pursued

The second step is the determination of whether, with regard to the objective pursued by the system in question, it constitutes an advantage for certain undertakings as compared with others which are in a comparable legal and factual situation in the light of the objective pursued by the reference system.[329] This step therefore allows the consideration of objectives in the assessment of material selectivity regardless of the fact that State aid law is characterised by the effects-based approach.[330] Simply speaking, derogations from the reference system are not selective if the undertakings, products or activities which are not taxed are objectively different to those taxed, or when the non-taxation derives from the logic or structure of the tax system. For instance, non-polluting activities are exempted from anti-pollution levies because their logic is to penalise polluting activity.[331]

This stage, like the other two, is characterised by some level of subjectivity and ambiguity, as there are no predefined criteria which would define how to identify the undertakings subject to comparison and what a 'comparable situation' in fact means.[332] One issue is also that the CJEU has in some cases conducted the assessment in the light of the *objective pursued by the particular measure* in question[333], and in some cases, in the light of the *objective pursued by the system* of which the measure forms a part[334], which is problematic as drawing a comparison in the light of the objective of the system (i.e. taxing company profits) or in the light of the objective of the measure (i.e. taxing energy consumption) is not the same and may result in different outcomes.[335] The choice between the two depends on the determination of the reference framework as explained above. In the light of recent case-law, AG *Hogan* considers that the material delimitation of the reference framework should be

[329] See, for instance, C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, ECLI:EU:C:2001:598, para. 41, C-88/03, *Portugal v Commission*, ECLI:EU:C:2006:511, para. 54, C-20/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981, para. 57, C-164/15 P, *Commission v Aer Lingus*, ECLI:EU:C:2016:990, para. 51.
[330] Bartosch, 2011, p. 181.
[331] Nicolaides, 2017, p. 70.
[332] Micheau, 2015, p. 333-334.
[333] See, inter alia, C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, ECLI:EU:C:2001:598, para. 41, C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:757, para. 79, T-219/10 RENV, *World Duty Free Group v Commission*, ECLI:EU:T:2018:784, para. 127.
[334] See, inter alia, C-308/01, *GIL Insurance and Others*, ECLI:EU:C:2004:252, para. 68, C-78/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, para. 54, C-20/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981, para. 57.
[335] Micheau, 2015, p. 335-337. See also De Cecco, 2013, p. 108, Ezcurra, 2016, p. 215-216.

determined in view of the subject matter covered by the tax from which the measure in question constitutes a derogation, not the measure itself. In this context, all the rules dealing with that subject matter, not only the tax from which the measure derogates, should be considered.[336] Nevertheless, it appears that the case-law of the CJEU remains unclear with this respect, it has for instance referred to both the objective of the tax system and objective of the tax itself even in the same judgement.[337]

The landmark case in the assessment of comparability in the light of the objective of the measure is the ECJ's ruling in *Adria-Wien,* where it held that the ecological considerations underlying the national legislation in question did not justify treating the consumption of natural gas or electricity by undertakings supplying services differently than undertakings manufacturing goods, because energy consumption by each of those sectors was equally damaging to the environment.[338] Hence, although the measure was considered selective, the ECJ acknowledged that environmental objectives may be the benchmark against which comparability is assessed. It could be deduced from the judgement that in the case of environmental aid measures, undertakings are in a comparable factual and legal situation if their activities are equally damaging to the environment. Therefore, it would not be discriminatory if a group of undertakings, who are in a different situation because their activities have different impact on the environmental objective pursued, are treated differently. This could be the case when a specific category of undertakings having a low impact on the environment would be granted a tax exemption, for instance.[339]

AG *Geelhoed* has used taxation of newly produced vehicles without a catalyser as an example with this respect, which, according to this line of reasoning, would not be selective due to the fact that undertakings producing environmentally-friendly vehicles are not in a comparable factual and legal situation with undertakings producing vehicles without a catalyser in the light of the objective of reducing pollution. He has pointed out that although a national measure of general nature may have undesirable consequences from an economic perspective, from a policy (and in my opinion, legal) point of view, classifying such measures as

[336] Opinion of AG Hogan in Joined Cases C-105/18 to C-113/18, UNESA, ECLI:EU:C:2019:395, para. 80. See also C-374/17, A-Brauerei, ECLI:EU:C:2018:741, paras. 36-37.
[337] See Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, paras. 61 and 65.
[338] C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, ECLI:EU:C:2001:598, para. 52.
[339] Wiesbrock, 2015, p. 83.

State aid may limit the Member States' opportunities to use fiscal measures as a legitimate policy instrument within the competences conferred on them.[340]

According to *Kingston*, the requirement that the measure in question should be applied to all activities which have a comparable impact on the environment in order for the measure not to be considered selective is problematic, as all environmental tax measures by their nature and logic entail a choice to tax a particular type of pollution or activity. As individual fiscal aid measures virtually never apply to all activities having a similar environmental impact, they would always be subject to the notification obligation under Article 108 TFEU, unless falling within the scope of application of the GBER.[341] However, at least when the reference framework is the tax itself, the comparison with regard to impacts on the environment is done in the light of its specific objectives[342], which makes it more feasible and targeted. As cases like *Kernkraftwerke* shows and as explained below, measures which are aimed at taxing a particular pollution or activity may not be selective.

After the ECJ's ruling in *Adria-Wien*, the GC appeared to be more willing to consider non-economic objectives in the assessment of selectivity. The famous case with this respect is *British Aggregates*, which concerned a levy imposed on so-called 'virgin aggregates' extracted from nature, whereas recycled aggregates were exempted from the levy, because they were more environmentally-friendly. Here, the GC held that in the absence of harmonisation, Member States may retain their powers in relation to environmental policy, and thus to introduce sectoral environmental levies in order to attain their respective policy objectives. It continued by noting that Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and to determine which goods or services should be subject to an environmental levy, and concluded that the levy in question was not selective.[343] The GC also referred to Article 11 TFEU by stating the Commission must take account of the environmental protection requirements referred therein when assessing an environmental levy in the context of State aid, as well as the PPP.[344]

[340] Opinion of AG Geelhoed in C-308/01, *GIL Insurance and Others*, ECLI:EU:C:2003:481, paras. 75-76.
[341] Kingston, 2012, p. 397-398.
[342] See Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, paras. 65-67.
[343] T-210/02, *British Aggregates v Commission*, ECLI:EU:T:2006:253, paras. 115, 156.
[344] Ibid, paras. 117, 136-137.

However, the ECJ rejected the ruling of the GC because it held that it did not respect the effects-based approach.[345] The ECJ did reaffirm that the Commission must take environmental protection requirements referred to in Article 11 TFEU into account in its assessment, but emphasised that the need to take account of those requirements, however legitimate, cannot justify the exclusion of selective measures from the scope of Article 107(1) TFEU, as they may be considered when the assessing the compatibility of the State aid measure with the internal market is assessed pursuant to Article 107(3) TFEU.[346]

Regardless of the ECJ's ruling in *British Aggregates*, GC suggested in case *Netherlands v Commission (NOx)* that ecological considerations could justify distinguishing undertakings, in this case between those emitting large quantities of NO_x from others, and thus be considered as an inherent feature of the reference system.[347] However, the ECJ again rejected this argument.[348] It may therefore be argued that since the judgement of the ECJ in *British Aggregates* and *NOx*, the standing of environmental objectives as a justification for different treatment between undertakings with respect to material selectivity appears weak. Regardless, it appears that both the ECJ and the Commission have subsequently allowed some room for the consideration of environmental objectives in the assessment of selectivity, and thus departed from strict adherence to the effects-based approach.

The Commission has, in line with the case-law of the CJEU, taken a stance on the standing of environmental objectives in the justification for different treatment in its Notice on the Notion of State aid from year 2016. Accordingly, the comparison between the undertakings is to be done in the light of the *intrinsic* objective of the system of reference, whereas *external* policy objectives — such as regional or environmental — cannot be relied upon by the Member State to justify the differentiated treatment.[349] In my opinion, one could argue that the Commission may have taken a shortcut when interpreting the case-law in a manner which automatically categorises all environmental objectives as external policy objectives. It appears to base this conclusion on judgement of the ECJ in case *P Oy*, which in fact concerned the exercise of discretion of tax authorities. In the paragraph referred to by the Commission,

[345] Case C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:757, paras. 85-87.
[346] Ibid, paras. 90-92. See also opinion of AG Mengozzi in C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:419, para. 102, and Kingston's critique thereof, Kingston, 2012, p. 398.
[347] T-233/04, *Netherlands v Commission*, ECLI:EU:T:2008:102, paras. 97-99.
[348] C-279/08 P, *Commission v Netherlands*, ECLI:EU:C:2011:551, paras. 75-78.
[349] Commission Notice on the notion of State aid, 2016, Section 5.2.3.2. para 135.

the ECJ stated that '*when competent authorities have a broad discretion to determine the beneficiaries or the conditions under which the financial assistance is provided on the basis of criteria unrelated to the tax system, such as maintaining employment, the exercise of that discretion must then be regarded as favouring 'certain undertakings or the production of certain goods'*.[350] The distinction between intrinsic and external objectives itself was already established in case *Portugal v Commission (Azores),* where the ECJ held that when assessing the guiding principles of the tax system, a distinction must be made between the objectives attributed to a particular tax scheme which are extrinsic to it and the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives.[351] However the conclusion that environmental considerations may never be considered as guiding principles of the tax system is difficult to draw directly from the wording of these two judgements, if the legal framework of the system is drafted in a manner which closely links its structure with environmental objectives.[352]

Importantly, however, the Commission explicitly allows the considerations of environmental objectives as a justification for difference in treatment with respect to *special-purpose levies* imposed to discourage certain activities or products that have an adverse effect on the environment. In such cases, different treatment of activities or products whose situation is different does not necessarily constitute a derogation.[353] The Commission thus appears to allow different treatment of undertakings if it results from the application of a special environmental tax measure which is closely structured around the objective of the protection of environment. On the other hand, the ability to rely on environmental objectives is precluded in the context of general taxes, as discussed above.[354] It should however be noted that the CJEU has found that also requirements stemming from EU secondary law may justify the difference in treatment of prima facie similar situations.[355]

[350] C-6/12, *P Oy*, ECLI:EU:C:2013:525, para. 27 and case-law cited.
[351] C-88/03, *Portugal v Commission*, ECLI:EU:C:2006:511, para. 81. See also C-78/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, para. 69.
[352] See Opinion of AG Saugmandsgaard Øe in C-374/17, *A-Brauerei*, ECLI:EU:C:2018:741, para. 150, where he argues that according to the reading of the relevant case-law, in order to be considered as 'intrinsic' to the reference framework, the tax scheme must be closely structured around the legitimate objective of protection of the environment.
[353] Commission Notice on the notion of State aid, 2016, Section 5.2.3.2. para 136.
[354] Opinion of AG Saugmandsgaard Øe in Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:741, para. 151.
[355] De Cecco, 2013, p. 106-107. See T-475/04, *Bouygues and Bouygues Télécom v Commission*, ECLI:EU:T:2007:196, C-431/07 P, *Bouygues and Bouygues Télécom v Commission*, ECLI:EU:C:2009:223

A recent example of the ECJ's assessment of comparability is its preliminary ruling in case *ANGED*, which concerned certain regional taxes raised on large retailers but not on small shops due to the traffic congestion caused by the large retailers. The purpose of that tax was to contribute towards environmental protection as well as town and country planning. Here, the ECJ started by referring to the Commission Notice on the Notion of State Aid, according to which Member States are free to decide on the economic policy which they consider most appropriate and to spread the tax burden as they see fit in accordance with EU law.[356] Importantly, it continued by stating that the environmental impact of retail establishments is indeed largely dependent on their size, and therefore, distinguishing between undertakings with a greater or lesser environmental impact with this respect is consistent with the objectives pursued by the measure in question.[357] Somewhat peculiarly, the ECJ pointed out next that the setting up of retail establishments is of particular significance for town and country planning policies, and therefore, a condition under which the imposition of a tax is based on the sales area of an undertaking differentiates between undertakings that are not in a comparable situation in the light of the objectives pursued. Then, it simply stated that a tax exemption received by the retail undertakings whose sales area was under the applicable threshold did not constitute a selective advantage.[358] This judgement is noteworthy in the sense the ECJ again acknowledged that environmental considerations may justify a difference in treatment between undertakings, although they were not the decisive factor in this case.

The ECJ's judgement in case *UNESA* serves perhaps the most recent example of both the definition of the applicable reference framework and derogation therefrom in the field of environmental taxes. The case concerned the lawfulness of a Spanish tax on the use of inland waters to produce electricity. The rationale of the tax derived from EU environmental directives which require the protection of water sources as well as the sustainable use of water, based on which Spain levied four different taxes in order to internalise the environmental costs arising from the use of inland waters for electricity production. The assessment of material selectivity related to one issue in particular: the tax did not apply to electricity generated from other sources of energy than water.[359]

[356] C-233/16, *ANGED*, ECLI:EU:C:2018:280, para. 51.
[357] Ibid., paras. 52-53.
[358] Ibid., paras. 54-56.
[359] Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935.

Here, the ECJ applied the tax measure itself as the reference framework. It stated that although the chosen tax criterion (the tax base relating to the source of production of electricity) does not appear to derogate from the reference framework, its effect is to exclude electricity producers whose source of production is other than water from its scope. It continued by referring the effects-based approach due to which it cannot be excluded *a priori* that the criterion of imposing the tax on the use of inland waters enables an advantage to be given by mitigating the tax burden of undertakings which are not subject to that tax. Therefore, the reference framework covered both undertakings subject to the tax and undertakings using other energy sources for the production of electricity.[360] The ECJ continued by assessing the comparability of the undertakings concerned in the light of the objective pursued by the inland water tax as expressed in national law – the protection and improvement of public water resources. Because the aim was to protect water resources and not all natural resources, electricity producers not using water were not in a comparable factual and legal situation with those using water in the light of the objective pursued.[361] Hence, there was no different treatment between undertakings in a comparable factual and legal situation and the tax was not selective. This judgement, along with *ANGED*, confirms that environmental objectives can be the benchmark against which the comparability of undertakings is assessed at least in case of special-purpose levies.

Finally, the ECJ also appears to consider taking a step-back with regard to negative harmonisation perhaps as a result of the critique of the EU's 'creeping competence'[362] in fiscal matters. It repeats that in the absence of EU rules governing the matter, it falls within the tax competence of the Member States to designate bases of assessment and to spread the tax burden across the various factors of production and economic sectors, and consequently, as a rule, opt for a criterion for taxation connected with a particular base or activity.[363]

c) Justification by the nature or general structure of the tax system

The third stage of the three-step test is the possibility conferred upon the Member States to escape State aid control by demonstrating that that the difference in treatment is justified since it flows from the nature or general structure of the system of which the measure forms

[360] Ibid., paras. 63-65.
[361] Ibid. paras. 66-67.
[362] On creeping competence, see, for instance, Lovdahl-Gormsen, 2019, p. 92-97.
[363] Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, paras. 68-69.

a part.[364] The conditions of application are strict – the Member State concerned must show that the measure in question is the direct result of the founding or guiding principles of the reference system or necessary for its functioning.[365] This necessitates showing that the measure is consistent with the inherent characteristics of the tax system and the manner in which that system is implemented.[366] It appears that such inherent characteristics may only be factors which in the strict sense relate to the functioning of the fiscal system, such as the progressive nature of taxation or fiscal neutrality.[367] Since the ECJ's judgement in *Paint Graphos*, the measure must also be proportionate, i.e. appropriate for attaining the objective concerned and not go beyond what is necessary to attain it, in order to be able to benefit from the justification.[368] It has been argued that this creates confusion and unnecessary overlap, as the requirement of proportionality already applies in the assessment under Article 107(3) TFEU.[369]

The Commission expressly states that it is not possible to rely on external policy objectives which are not inherent to the system as a justification.[370] Unlike in the assessment of different treatment in the light of the objective of the measure, there is no explicit exception which would allow the consideration of external policy objectives with regard to special-purpose levies. Hence, it appears that there is little or no room for environmental considerations at this stage. For instance, the Commission has not considered tax exemptions relating to the ETS to be justified by the nature and logic of the system, as it viewed the ETS as a part of the national *legal system* instead of the national *fiscal system*.[371] However, the possibility

[364] See, inter alia, C-374/17, *A-Brauerei*, ECLI:EU:C:2018:1024, para. 44, C-203/16 P, *Andres (faillite Heitkamp BauHolding) v Commission*, ECLI:EU:C:2018:505, para. 87, C-20/15 P, *Commission v World Duty Free Group*, ECLI:EU:C:2016:981, para. 58, C-417/10, *3M Italia*, ECLI:EU:C:2012:184, para. 40. On the burden of proof, see C-159/01, *Netherlands v Commission*, ECLI:EU:C:2004:246, para. 43, C-279/08 P, *Commission v Netherlands*, ECLI:EU:C:2011:551, para. 62.
[365] T-251/11, *Austria v Commission*, ECLI:EU:T:2014:1060, para. 117, C-78/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, para. 69.
[366] C-78/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, para. 73.
[367] Bovis et. al., 2016, p. 139, T-219/10, *RENV - World Duty Free Group v Commission*, ECLI:EU:T:2018:784, paras. 170-172. See also Commission Notice on the Notion of State Aid, 2016, Section 5.2.3.3. para. 139 and Commission Notice on the application of the State aid rules to measures relating to direct business taxation, 1998, para. 24.
[368] C-78/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, para. 75. It should be noted that some have questioned whether the appropriateness of the measure is required under this proportionality assessment, as the ECJ expressly mentions the condition of necessity only (see Szudoczky, 2016, p. 377). However, in my view, requiring adherence to the principle of proportionality itself entails the requirement of appropriateness.
[369] Buendia Sierra, 2018, p. 91.
[370] Commission Notice on the Notion of State Aid, 2016, Section 5.2.3.3. para 138.
[371] Sandberg, 2018, p. 68-69. See, for instance, 2009/972/EC, Commission Decision of 17 June 2009 on aid scheme C 41/06 (ex N 318/A/04) which Denmark is planning to implement for refunding the CO2 tax on quota-regulated fuel consumption in industry, OJ L 345, p. 18–27, paras. 38 and 40-45.

that the CJEU would interpret the inherent characteristics of the system in question to include environmental objectives in the future cannot be excluded.

Considering the above, it may be concluded that most room for environmental considerations in the assessment of material selectivity appears to be found in the assessment of existence of differentiated treatment in the light of the objective pursued by special-purpose levies. In fact, AG *Hogan* argues that the CJEU only considers the objective of the measure in the determination of selectivity when the reference framework is pursuing a specific objective. By contrast, when the main objective of a tax measure is raising State revenue, the CJEU, although sometimes referring to 'objectives', determines the framework by reference to its broader subject matter.[372] Hence, the definition of the reference framework plays a key role, as external objectives appear to be considered only when it is designed to pursue a specific objective of environmental protection.

4.2.2. Alternative approaches

It has been argued that strict adherence to the effects-based approach and the broad interpretation of the notion of material selectivity have resulted into excessive State aid control at the expense of the ability of the Member States to pursue their legitimate public policy objectives by regulatory means. Hence, it has been suggested that an alternative reading of the selectivity criterion could strike a balance between safeguarding competition and the competences of the Member States.[373] However, the more flexible the interpretation becomes, the more challenges it poses with respect to legal certainty, which sets limits to the extent to which opposing objectives may be reconciled.[374] The premise of the following discussion is that EU competition law should not be a closed system, but instead should seek coherence with other fields of EU law.[375]

The approach undertaken by the ECJ rulings such as *British Aggregates* and *NOx*, which adhered to strict effects-based approach, prevailed for several years. However, after rulings such as *Kernkraftwerke*, *ANGED* and *UNESA*, as well as the guidance provided in the

[372] Opinion of AG Hogan in Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:395, para. 87. See also C-236/16, *ANGED*, ECLI:EU:C:2018:291, para. 40.
[373] See, inter alia, Szudoczky, 2016, p. 370, Bartosch, 2010, p. 751.
[374] Raitio, 2018, p. 490.
[375] See, by analogy, Raitio, 2018, p. 493-495.

Commission's notice in year 2016, it appears that environmental objectives may still have a role to play in the assessment of material selectivity especially in the definition of the reference system and derogation therefrom. Hence, the debate on which should prevail: the effects-based approach, the objectives-based approach, or something in between, is still ongoing.

It may be argued that the effects-based approach is more in line with the principle of legal certainty, as the identification of the 'main' objective pursued always entails a value choice, because most tax provisions pursue several objectives simultaneously. As AG *Saugmandsgaard Øe* puts it, giving preference to some objectives to the detriment of others may entail a risk of an arbitrary choice being made.[376] On the other hand, if one interprets the wording of Article 107(1) TFEU in the context of other Treaty provisions, the requirements for environmental protection laid down therein as well as the integration principle laid down in Article 11 TFEU may warrant a redefinition of the effects-based approach.[377] AG *Bobek* has suggested an approach which may allow the consideration of requirements stemming from both legal certainty and the integration principle. According to him, when assessing the comparability of undertakings, both the scope of application of the measure in relation to the undertakings and/or situations it covers and the objective of the measure in terms of the objectives it wishes to pursue should be taken into account. He maintains, based on the ECJ's *NOx* judgement, that environmental objectives may be the objectives against which the comparability assessment is made.[378]

Indeed, several legal scholars have contemplated on the potential of a more objectives-based reading of the selectivity criterion in order to better respect the integration principle and the division of competences between the Member States and the EU in fiscal matters. Objectives-based approach simply means allowing the consideration of the objective of the measure in its entirety, be it external or internal, in the assessment of material selectivity.[379] *Micheau* demonstrates that the objectives-based approach would have led to a different conclusion in *British Aggregates*, since taxing virgin aggregate would have reduced its demand and boost the use of secondary and waste aggregate, which in turn would have led to a decrease

[376] Opinion of AG Saugmandsgaard Øe in Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:741, para. 144. See also Opinion of AG Bobek in Case C-270/15 P, *Belgium v Commission*, ECLI:EU:C:2016:289, para. 37.
[377] Wiesbrock, 2015, p. 78-80.
[378] Opinion of AG Bobek in Case C-270/15 P, *Belgium v Commission*, ECLI:EU:C:2016:289, paras. 31-36.
[379] See, for instance, Micheau, 2015, p. 341-343.

in the use of non-renewable resources and thus promoted the protection of the environment.[380] The discussion on the objectives-based approach is linked with the discussion on the possible need for a 'rule of reason' in State aid law, which puts emphasis on the legitimacy of the aim pursued by the measure, which could lead to its qualification as a general measure rather than a selective one.[381]

Most scholars discussing the objectives-based approach base themselves on the ideas of *Bartosch*, who has suggested the following methodology as an alternative for the prevailing three-step test: 1) identifying the reference framework, 2) analysing the permissible objectives from State aid control perspective, and 3) assessing whether the measure may be justified by the nature or general scheme of the reference framework.[382] Hence, the test does not look that different from the current one. The main difference would be that the second and third step would be characterised by a legitimacy assessment similar to that undertaken in the context of fundamental freedoms. In practise, this would mean that after establishing the reference system, it would be assessed whether the identified derogation therefrom is justified on grounds of a legitimate objective. Justification would necessitate that the measure is not a means of arbitrary discrimination and that it would be appropriate for securing the attainment of the objective pursued and not go beyond what is necessary in order to attain it.[383] However, since *Paint Graphos*, the requirement of proportionality is already embedded in the third stage of the analysis.[384] In addition, it has been pointed out that convergence with the rules on fundamental freedoms would not necessarily lead to a broader range of justifications under Article 107 TFEU, as the accepted justifications for tax measures in the context of fundamental freedoms resemble those accepted under the nature or general structure of the tax system.[385]

It cannot be disputed that the *rule of reason* approach, when understood as allowing for more flexibility in the assessment of the legitimate objective under Article 107(1) TFEU, would provide more leeway in the exercise of the national regulatory autonomy in the design of

[380] Ibid.
[381] Prek; Lefevre, 2012, p. 340.
[382] Bartosch, 2010, p. 741.
[383] Micheau, 2015, p. 343-344, Szudoczky, 2016, p. 374.
[384] C-78/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, para. 75, by comparison with C-110/05, *Commission v Italy*, ECLI:EU:C:2009:66, para. 59. Proportionality is also manifested in the de minimis regulations, as small amounts of aid are not considered that affect the market so significantly that control would be needed.
[385] Szudoczky, 2016, p. 372.

fiscal measures.[386] It is however debatable whether such a change in the established assessment methodology would be feasible as it is, just like the currently applicable three-step test, subject to discretionary elements and there would be no guarantee that it would result into a more satisfactory outcome than the currently applicable test. In line with *De Cecco*, the assessment based on the rationale of national legislation risks shifting the definition of State aid into a subjective territory and could allow the design of measures that seemingly pursue a legitimate objective but are in fact protectionist. Hence, there are grounds for a more positivist manner that the interpretation of Article 107(1) TFEU should remain guided by *rule of law* concerns, such as legal certainty and equality.[387] The objectives-based approach would open an endless debate on what is legitimate and illegitimate. As *Bartosch* himself notes, State aid control would be deprived of its meaning if Member States were permitted to use any political objective in order to argue that a measure is not materially selective.[388] Hence, there ought to be rules which determine how to assess what is in fact legitimate in each particular case, which is the aim of the objectives-based approach. It is however not possible to list all the legitimate objectives *ex ante* at EU level, as it would interfere with the Member States' discretion in fiscal matters.[389]

In my opinion, although attractive from a policy perspective, the other proposals for an alternative reading of material selectivity discussed next are perhaps more feasible for addressing the prevailing issues, as they are built on the logic of State aid law itself. It may be more in line with the principle of legal certainty to establish rules of interpretation in the context of State aid law, which has objectives specific to it, rather than borrowing the assessment methods applied in other fields of EU law, which have objectives of their own. For instance, the main purpose of the rules governing the fundamental freedoms is to ensure the proper functioning of the internal market, whereas State aid law has primarily to do with regulating competition between undertakings, not between Member States *per se*. Hence, it has been suggested that it might be more feasible to aim at drafting a set of more objective criteria which would predefine the autonomy of the Member States with respect to the design of their tax policies instead of moving towards the logic of rule of reason.[390] In addition, State aid law is characterised by a public governance element as it concerns the *actions of the*

[386] De Cecco, 2013, p. 109.
[387] Ibid., p. 109, 113.
[388] Bartosch, 2010, p. 741.
[389] Micheau, 2015, p. 344-345.
[390] Peters, 2019, p. 13-14.

State. Hence, neither the application of the more economic-oriented approach[391] similar to that applied in the context of Articles 101-102 TFEU, which concerns the *actions of undertakings*, would not be without problems.

Another alternative instead of putting emphasis on the objective of the measure, is to focus on the tax competences of the Member States, which should allow them to define the applicable reference framework to start with. The framework could be drafted on the basis of environmental objectives and the measure could escape State aid control, if it is well suited to achieve the aims established by the national legislator, and all the under takings in a comparable situation in the light of those objectives are taxed. In fact, this option already exists in terms of special-purpose levies. As argued by *Piernaz Lopez*, this option is in line with the effects-based approach as well as the objective definition of the concept of State aid, unlike the objectives-based approach. What could not be justified under this logic are derogations from general systems on grounds of external policy objectives.[392] This is the line currently applied by the CJEU and Commission as explained above.

Furthermore, there are robust arguments which promote a shift to an approach somewhere in between of the effects- and objectives-based approach. In my view, some more flexibility in terms of the consideration of environmental objectives under Article 107(1) TFEU along these lines may be needed in order to not only make it more feasible for the Member States to design national measures in line with the binding emissions reductions targets, but also in order to set a balance between protection of competition and a reasonable degree of freedom of the Member States to pursue public policy goals without being subject to the notification obligation pursuant to Article 108(3) TFEU.[393]

Wiesbrock argues that proper integration of environmental considerations at all stages of State aid control necessitates explicit consideration of environmental objectives already when applying Article 107(1) TFEU on a case-by-case basis. Measures such as general

[391] This approach would put emphasis on the definition of the relevant market and competition between undertakings therein. Therefore, if undertakings would not engage in activities in the same market, the tax measure granted to undertakings in one market would not have detrimental effects to undertakings in another market. This would pose practical problems in terms of application; for instance, a sector-based tax aid should be assessed in the light of the tax treatment applicable in all the same sectors in every Member State. See Micheau, 2015, p. 344-348.
[392] Piernaz Lopez, 2018, p. 279-280.
[393] With this respect, see Bartosch, 2011, p. 187.

exemptions from environmental taxes should fall outside the scope of Article 107(1) TFEU if they are generally available across sectors in line with objective and predefined conditions. Instead, measures which exempt undertakings from the financial burden they would normally have to bear under the general system of charges confer a selective advantage.[394] This approach would allow the integration of environmental objectives within the existing framework of State aid law.

Instead of the putting more emphasis on the environmental objectives of the measure as such, *Nowag* suggests emphasising the application of the PPP in the assessment of material selectivity similarly to *Wiesbrock*: whenever a State measure relieves an undertaking from costs it would normally have to bear under the applicable legal framework for environmental protection, it receives a selective advantage. According to the logic of PPP, a measure escapes State aid control when it addresses all undertakings engaged in a particular activity which produces certain type of pollution in a consistent manner. *Nowag* emphasises the fact that the rulings of the ECJ such as the *British Aggregates* do not mean that it rejects the consideration of environmental objectives altogether, but instead rejects the idea that they could as such be sufficient to exclude the measure from State aid control. He also replies to the critique presented by *Kingston*: the prevailing interpretation of selectivity does not mean that each measure should address all activities having a similar environmental impact. Instead, it emphasises two points: 1) environmental objectives as such are not sufficient to exclude a measure from State aid control[395], as the effects of the measure must always be taken into account, and 2) the measure must address a particular negative externality stemming from a particular activity and all undertakings engaged in that activity in a consistent manner.[396] Therefore, the PPP can be considered as a fundamental feature of the reference system on grounds of which differences in treatment may be justified.[397]

As a matter of fact, it appears that *Nowag* in a way argues that environmental considerations can be taken into account when assessing the effects of the measure – a specific activity which does not have the effect of producing a particular negative externality may be treated differently than the activities producing it.[398] He also emphasises the fact, like *Wiesbrock*,

[394] Wiesbrock, 2015, p. 84-85.
[395] Similarly, Kingston, 2012, p. 399.
[396] Nowag, 217, p. 108-109.
[397] De Cecco, 2013, p. 109-110.
[398] Nowag, 2017, p. 109.

that should integration only be allowed to take place under Article 107(3) TFEU, it conflicts with the very idea of balancing environmental considerations with other policy considerations at all stages of decision-making as required under Article 11 TFEU.[399] Balancing *ex post* should only occur if integration *ex ante* is not possible, which should also be the most efficient option from an economic point of view.[400] Integration *ex ante* is possible if the case-law of the CJEU is interpreted to prohibit the exclusion of measures from State aid control on grounds of their environmental objectives as such, but to nevertheless allow their consideration in the assessment under Article 107(1) TFEU.

What is important is that the ECJ has on many occasions held that the objective of the framework can be environmental protection. Therefore, derogations from that framework must applied consistently in the light of the identified aim in order to avoid discriminatory treatment of undertakings; the measure must address all undertakings engaged in the particular activity or creating the particular type of pollution in order not to be considered selective. *Nowag* argues that this *'consistency' test* is in line with the PPP – Member States should aim at internalising negative externalities and ensuring that the price of goods and services reflects the pollution caused by them.[401] *De Sadeleer* points out that adherence to the PPP and Article 11 TFEU should also mean that aid measures which are in principle aimed at the protection of the environment but nevertheless pose a threat to it should be prohibited even if they would comply with the requirements of competition law. At the same time, aid measures which verifiably promote the protection of the environment should be more easily approved regardless of their anti-competitive effects, as long as they remain proportional.[402]

In my view, *Nowag's* suggestion would not only promote adherence to the integration principle and environmental principles prescribed for in the TFEU but also bring more clarity into the assessment of selectivity in the context of environmental measures and thus promote legal certainty. Hence, it bears both material and formal value. It also appears to be enforced in the recent case-law of the ECJ, for instance in case *Kernkraftwerke*, the comparability of undertakings was assessed in the light of the pollution (radioactive waste) generated.[403] On

[399] Nowag, 2017, p. 110. See also Wiesbrock, 2015, p. 78-79.
[400] Nowag, 2015, p. 29.
[401] Nowag, 2017, p. 110-111. Nowag also points out that using the PPP as a benchmark for comparability appears to be supported by the case-law concerning the restrictions on free movement, too.
[402] De Sadeleer, 2014, p. 467.
[403] C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, ECLI:EU:C:2015:354, paras. 78-79.

the other hand, one may argue that taking the PPP as the guiding principle does not leave enough room for manoeuvre in the design of regulatory measures, as the attainment of the climate policy objectives demands more than merely internalising the environmental cost in prices.[404] However, the aid measures paving way to the structural changes needed are unlikely fiscal by nature. Furthermore, it should be noted that *Nowag's* reasoning only provides arguments under which a measure may not be considered selective and may thus avoid the classification as prohibited aid under Article 107(1) TFEU. Naturally measures which are selective must remain under the scrutiny of State aid control and subject to the justification assessment *ex post* under Article 107(3) TFEU.

4.2.3. Geographic selectivity

The notion of geographic selectivity and its application appear to be rather well-established[405], and it does not provide grounds for environmental considerations as such as it concerns issues of division of tax powers within a Member State. Hence, in the context of this dissertation, it is appropriate to limit the examination of the concept to a general overview. The notion of geographic selectivity covers measures which favour undertakings operating in a specific region.[406]

First, it should be clarified that selectivity is assessed with respect to undertakings operating within the Member State concerned, not between undertakings established in different Member States.[407] Geographic selectivity, also known as regional selectivity, may be established when a measure which is otherwise general in nature is only applied within a certain region of a Member State. Therefore, the principal rule is that only measures which apply within the entire territory of the Member State may escape State aid control.[408] Nevertheless, the fact that the applicable reference framework is not defined within the limits of the Member State concerned but within the limits of a smaller entity therein does not automatically render

[404] See, for instance, Ezcurra, 2014, p. 666.
[405] See, for instance, Bartosch, 2011, p. 176.
[406] De Cecco, 2013, p. 120.
[407] Verouden and Stehman, 2016, p. 36, De Cecco, 2013, p. 41.
[408] Commission Notice on the Notion of State Aid, 2016, Section 5.3. para. 142.

the measure selective[409], if certain requirements derived from the case-law of the CJEU are met.[410]

One important element is the autonomous status of the regional or local authority – if it exercises the powers conferred on it by law and enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of the Member State, the central government does not play a fundamental role in the definition of the political and economic environment in which the undertakings within that region operate.[411] Therefore, if a certain regional or local authority is sufficiently autonomous, the tax measures it imposes do not meet the criteria of geographic selectivity. This scenario – *the asymmetrical devolution of tax powers* – is one of the three scenarios for the assessment of geographic selectivity as identified by the Commission. A sufficient level of autonomy necessitates the fulfilment of three cumulative criteria of autonomy: institutional, procedural and economic and financial.[412] The guidance for the determination of the criteria is rather well-explained in the Commission's Notice on the Notion of State aid.[413]

A second scenario for the assessment of geographic selectivity is the *symmetrical devolution of tax powers*, which means that all regional authorities enjoy the same tax powers independently from the central government. In this case, selectivity cannot be established if it is not possible to define a common reference framework for all the regions.[414] Finally, where a measure which is supposed to apply within a defined geographical area is unilaterally decided by the central government of a Member State, it is always selective.[415] This is natural because the geographic reference framework for the actions of the central government is the whole state.

[409] C-88/03, *Portugal v Commission*, ECLI:EU:C:2006:511, para. 57, Joined Cases C-428/06 to C-434/06, *Unión General de Trabajadores de la Rioja*, ECLI:EU:C:2008:488, para. 47, C-169/08, *Presidente del Consiglio dei Ministri*, ECLI:EU:C:2009:420, para. 60.
[410] Commission Notice on the Notion of State Aid, 2016, Section 5.3. para. 142. See also Bovis et. al., 2016, p. 144-146.
[411] Joined Cases C-105/18 to C-113/18, *UNESA*, ECLI:EU:C:2019:935, para. 70, C-233/16, *ANGED*, ECLI:EU:C:2018:280, para. 41 and case-law cited.
[412] C-88/03, *Portugal v Commission*, ECLI:EU:C:2006:511, para. 67, Commission Notice on the Notion of State Aid, 2016, Section 5.3. para. 144(3).
[413] Commission Notice on the Notion of State Aid, 2016, Section 5.3.
[414] Bovis et. al., 2016, p. 144. See also Commission Notice on the Notion of State Aid, 2016, Section 5.3. para. 144(2).
[415] Commission Notice on the Notion of State Aid, 2016, Section 5.3. para. 144(1).

4.3. Economic advantage

The concept of an economic advantage is closely linked with that of selectivity, and sometimes they appear to be combined in the language used by the Commission and the CJEU.[416] However, they are two separate concepts – economic advantage conferred on undertakings as such does not constitute State aid unless it is selective by nature.[417] Once an advantage arising from a particular measure has been identified, it is for the Commission to show that it is selective.[418] However, in terms of individual aid measures, the fulfilment of the advantage condition may create a presumption of selectivity.[419] In terms of general measures, it is for the Commission to establish that although conferring an advantage of general application, the benefit of that advantage is exclusively conferred on certain undertakings or sectors. Only tax advantages resulting from a general measure applicable without distinction to all economic operators do not constitute aid.[420] As mentioned above, in the case of fiscal measures, the cumulative criteria are rather easily met with the exemption of selectivity.

Advantage as understood within the context of Article 107(1) TFEU is an economic benefit that the undertakings concerned would not have obtained under normal market conditions, that is, without State intervention.[421] Typically, the advantage must also confer an additional burden for the State[422], although, as mentioned above in Chapter 4.1.2., fiscal measures which mitigate the burden normally included in the budget of the undertaking satisfy the State resources criterion.[423] An advantage is therefore either a positive economic benefit or a relief from costs – the main point is that it must have economic value.[424] Hence, whenever

[416] See, for instance, Piernas Lopez, 2018, p. 277.
[417] See, inter alia, T-53/16, *Ryanair and Airport Marketing Services v Commission*, ECLI:EU:T:2018:943, para. 162 and case-law cited.
[418] Opinion of AG Wahl in C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:32, para. 47, repeated by the ECJ in C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para. 59.
[419] Kyriazis, 2016, p. 433, C-270/15 P, *Belgium v Commission*, ECLI:EU:C:2016:489, para. 49, C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para. 60, T-257/18, *Iberpotash v Commission*, ECLI:EU:T:2020:1, para. 117.
[420] C-203/16 P, *Andres (faillite Heitkamp BauHolding) v Commission*, ECLI:EU:C:2018:505, paras. 84-85 and case-law cited.
[421] Schöning and Ziegler, 2018, p. 9. See C-39/94, *SFEI and Others*, ECLI:EU:C:1996:285, para. 60, C-140/09, *Fallimento Traghetti del Mediterraneo*, ECLI:EU:C:2010:335, para. 34, C-579/16 P, *Commission v FIH Holding and FIH Erhversban*, ECLI:EU:C:2018:159, para. 44, T-778/17, *Autostrada Wielkopolska v Commission*, ECLI:EU:T:2019:756, para. 83 and case-law cited.
[422] C-345/02, *Pearle and Others*, ECLI:EU:C:2004:448, para. 36, Joined Cases C-72/91 and C-73/91, *Sloman Neptun v Bodo Ziesemer*, ECLI:EU:C:1993:97, para. 21.
[423] C-399/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, ECLI:EU:C:2013:175, paras. 100-101.
[424] C-518/13, *Eventech*, ECLI:EU:C:2015:9, para. 47.

the financial situation of an undertaking is improved as a result of State intervention, an advantage is present. Such an improvement is shown by comparing the financial situation of the undertaking as a result of the measure with the financial situation of that undertaking had the measure not been granted.[425]

Tax reductions and exemptions are always the result of State intervention and thus constitute a benefit which would not have been available under normal market conditions and which has the effect of improving the financial position of the undertakings concerned, therefore, the existence of an advantage is rarely disputed in these cases.[426] However, there have been cases where a tax benefit was not considered to constitute an advantage when the recipient undertakings were legally obliged to pass on the whole amount of the tax benefit to their customers.[427] Nevertheless, exempting such measures whose indirect beneficiaries are consumers from the scope of State aid control appears unlikely today, as the ECJ has stated that even if the direct recipient of the benefit is a consumer, it can still constitute indirect aid in favour of an undertaking if its effect is to incentive consumers to purchase its products or services.[428] It would be against the effects-based approach to exempt schemes in which the advantage is indirect by nature from State aid control.[429] The concept of an advantage is of particular importance in the context of SGEI, which will be left out of further examination due to the limitations of this dissertation.

An important tool in the assessment of existence of an advantage is the so-called *market economy operator test*, which applies when public authorities engage in economic activity. Accordingly, the actions of a public body do not constitute State aid if a private investor of a comparable size operating under normal market conditions could have made the same investment.[430] The rationale is that Member States may play a role in economic life by acting

[425] See, inter alia, C(2015) 7143 final, Commission Decision of 21 October 2015 on State Aid Implemented by the Netherlands to Starbucks, Case SA.38374 (2014/C ex 201 4/NN), "Starbucks", para. 256, C(2015) 7152 final, Commission Decision of 21 October 2015 on State Aid which Luxembourg Granted to Fiat, Case SA.38375 (2014/C ex 2014/NN), "Fiat", para. 220, and case-law cited, Joined Cases T-778/16 and T-892/16, *Ireland v Commission*, ECLI:EU:T:2020:338, para. 203.
[426] However, the concept of advantage has raised issues in the context of multinational tax arrangements and transfer pricing, for this, see Kyriazis, 2016.
[427] See, inter alia, C(2007) 4297 final, Commission Decision of 25.09.2007 on State aid N715/06, Finland. Tax Exemption to Finnvera Oyj, paras. 14-18, Tanskanen, 2013, p. 40-41.
[428] Kerle and Flynn, 2016, p. 350, C-403/10 P, *Mediaset v Commission*, ECLI:EU:C:2011:533, paras. 64 and 81.
[429] Kerle and Flynn, 2016, p. 291-292.
[430] See, inter alia, Bovis et. al., 2016, p. 105-126. See also Commission Notice on the Notion of State Aid, 2016, Section 4.2.1. paras. 74-75 and case-law cited.

as market participants as long as it does not hamper the fulfilment of the internal market objectives.[431] Hence, the definition of aid under Article 107(1) TFEU cannot cover a measure granted to an undertaking through State resources where it could have obtained the same advantage in circumstances which correspond to normal market conditions.[432] However, this test is only applicable when the State acts as a market operator, not when it acts in its capacity as a public authority.[433]

In practise, it is not always unequivocal to classify the actions of the State into one of these categories only. With regard to tax measures, it is quite clear that State acts in its capacity as a public authority by imposing regulations. However, again, in order to guarantee the *effect utile* of EU law and to ensure that the regulatory technique used is not decisive in the classification of aid, the CJEU has stated that the fiscal nature of the process used to grant the advantage does not mean that the applicability of the market operator test can automatically be ruled out. This was the case with regard to a waiver of a tax claim in the context of a capital injection into an undertaking of which the State was the sole shareholder, where it was considered that the State acted in its capacity as a shareholder.[434] Nevertheless, as pointed out by AG *Mazák*, it should remain clear that the fiscal activities of the State are undertaken in the exercise of its public authority and cannot by definition be undertaken by a private entity.[435] Hence, although the discussion on the limits of use of public authority is an interesting one, it will not be dwelled on further here.

Finally, it should be noted that there appears to be no room for the consideration of environmental objectives in the assessment of an advantage, as only its effect and economic nature matter.[436] Nonetheless, *Nowag* has argued that environmental considerations could be taken into account under the market operator test, which is based on assessing the conditions under which 'prudent market investors' operate. Given the changes in the business environment

[431] De Cecco 2013, p. 67.
[432] C-579/16 P, *Commission v FIH Holding and FIH Erhversban*, ECLI:EU:C:2018:159, para. 45, C-533/12 P, *SNCM and France v Corsica Ferries France*, ECLI:EU:C:2014:2142, para. 30, C-124/10 P, *Commission v EDF*, ECLI:EU:C:2012:318, para. 78 and case-law cited.
[433] See, inter alia, C-579/16 P, *Commission v FIH Holding and FIH Erhversban*, ECLI:EU:C:2018:159, para. 55, T-565/08, *Corsica Ferries France v Commission*, ECLI:EU:T:2012:415, para. 79 and case-law cited.
[434] C-124/10 P, *Commission v EDF*, ECLI:EU:C:2012:318, paras. 32, 44, 91-92, 108. See also Bovis. et. al. 2016, p. 123-125.
[435] Opinion of AG Mazák in C-124/10 P, *Commission v EDF*, ECLI:EU:C:2011:676, para. 79. See also opinion of AG Léger in C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, ECLI:EU:C:2002:188, para. 22.
[436] Schöning and Ziegler, 2018, p. 10, Nowag, 2017, p. 93-94.

during the last decade or so, one cannot argue that taking environmental considerations into account would render the actions of an investor imprudent. Furthermore, the case-law of the CJEU may allow the application of the market operator test to investments with an environmental motive, as long as they are profitable in the short or long run.[437] The possibilities for shifting to a s*ustainable market operator test* are nevertheless limited, as the key focus is on the assessment of the terms of investment, which appear rather identical in environmental and non-environmental cases.[438] Although interesting, this discussion is not that relevant in the context of this dissertation, as the market operator test does not as a rule apply to fiscal measures.

4.4. Distortion of competition and effect on trade

The last criterion laid down in Article 107(1) TFEU is the requirement that the measure must distort or threaten to distort competition and affect trade between Member States. These two conditions – distortion of competition and effect on trade – are separate but intertwined and thus as a rule considered together.[439] They are rather easily met, as in fact no actual effects on competition and trade need to be proven by the Commission based on an economic analysis of the market; it is sufficient to show that the measure is liable to have such effects.[440] This is the case when the measure may improve the competitive position of the recipient undertaking compared to undertakings with which it competes, which is generally the case when the other cumulative criteria are met. As a rule, an economic advantage as defined above is itself enough to establish effect on competition, as it relieves undertakings from expenses they would otherwise have to bear.[441] For instance, the marginal costs of an electricity undertaking are reduced when it is exempted from paying energy consumption taxes, which affects the competitive balance in the market and is likely to change the behaviour of the recipient undertaking by providing it an incentive to produce more (green) electricity.[442]

[437] Nowag, 2017, p. 97-98. See also Kingston, 2012, p. 381-382.
[438] Nowag, 2017, p. 99. However, Nowag points out that sustainability-minded investors may consider the viability of the terms of investment differently than non-sustainability-minded ones.
[439] Bovis et. al., 2016, p. 151. See also Commission Notice on the Notion of State Aid, 2016, Section 6.1. para. 186 and case-law cited.
[440] C-659/17, *Azienda Napoletana Mobilità*, ECLI:EU:C:2019:633, para. 29, C-128/16 P, *Commission v Spain and Others*, ECLI:EU:C:2018:591, para. 86, C-211/15 P, *Orange v Commission*, ECLI:EU:C:2016:798, para. 64, C-672/13, *OTP Bank*, ECLI:EU:C:2015:185, para. 54 and case-law cited.
[441] C-128/16 P, *Commission v Spain and Others*, ECLI:EU:C:2018:591, para. 84, C-211/15 P, *Orange v Commission*, ECLI:EU:C:2016:798, para. 66 and case-law cited. See also Commission Notice on the Notion of State Aid, 2016, Section 6.2. paras 187, 189.
[442] Verouden and Stehman, 2016, p. 37.

With regard to trade between Member States, it is as a rule considered to be affected when the measure in question strengthens the position of an undertaking compared with other undertakings competing in intra-EU trade.[443] However, the criterion may also be met in cases where there is no cross-border trade, as the local or regional nature of the targeted activity does not exclude the possibility that trade between Member States is affected.[444] In these cases, the focus is more on market access, where the language used by the CJEU is sometimes similar to the one used when assessing restrictions on fundamental freedoms.[445] In this connection, it is not necessary that the beneficiary undertaking participates in intra-EU trade, as the measure in question may nevertheless help it to pursue its domestic activities, due to which undertakings established in other Member States may have less chance of penetrating the market of the Member State concerned. In addition, it may place the recipient undertaking in a position which enables it to penetrate the market of another Member State.[446]

It appears established case-law that aid in the form of a tax relief is most likely to have an effect on trade between Member States where taxable persons perform an economic activity in the field of such trade or it is conceivable that they are in competition with undertakings established in other Member States.[447] In general, these conditions are satisfied.[448] In any case, it is difficult to show that effects on trade and competition would not suffice in the case of an existence of a selective advantage, as it establishes a strong presumption of at least a risk of such effects. Furthermore, the capacity of the measure to strengthen the recipient's competitive position is assessed by reference to the advantage given, not by the operating results of its competitors.[449] This reasoning based on a presumption is applied by the CJEU and the Commission in cases where an advantage is granted in a liberalised market.[450] The only clear scenario where competition and trade are considered unaffected is when the measure falls within the scope of the de Minimis Regulation.

[443] C-518/13, *Eventech*, ECLI:EU:C:2015:9, para. 66, C-53/00, *Ferring*, ECLI:EU:C:2001:627, para. 21 and case-law cited.
[444] C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, ECLI:EU:C:2003:415, para. 77.
[445] See, for instance, C-148/04, *Unicredito Italiano*, ECLI:EU:C:2005:774, paras. 58, 62, compare with C-322/01, *Deutscher Apothekerverband*, ECLI:EU:C:2003:664, para. 72.
[446] C-672/13, *OTP Bank*, ECLI:EU:C:2015:185, para. 56, C-148/04, *Unicredito Italiano*, ECLI:EU:C:2005:774, para. 58. See also Commission Notice on the Notion of State Aid, 2016, Section 6.3. para. 192.
[447] C-128/16 P, *Commission v Spain and Others*, ECLI:EU:C:2018:591, para. 85 and case-law cited.
[448] Opinion of AG Kokott in C-66/14, *Finanzamt Linz*, ECLI:EU:C:2015:242, para. 114. See also Peters, 2019, p. 12.
[449] T-818/14, *BSCA v Commission*, ECLI:EU:T:2018:33, para. 211 and case-law cited.
[450] Bovis et. al., 2016, p. 152. See also Commission Notice on the Notion of State Aid, 2016, Section 6.2. para. 187.

However, it appears that the Commission is willing to consider a stricter application of the condition, as it has expressly stated in its Notice from year 2016 that an effect on trade cannot be merely presumed, but it must be established based on the foreseeable effects of the measure.[451] Accordingly, a measure could be considered not to effect trade between Member States when the beneficiaries supply goods or services locally in a manner which is unlikely to attract customers or investors from other Member States.[452] Hence, also a fiscal measure satisfying these conditions could exceptionally escape State aid control, however, its practical scope of application appears limited.[453] Indeed, the focus on macro level instead of micro level analysis appears to be more in line with the logic of State aid policy, which aims to prevent harmful State intervention in the first place.[454]

Regardless, it has been argued that a more throughout economic examination of whether competition is in fact distorted could provide room for environmental integration. *Nowag* points out that a clear separation between the condition of selectivity and effect on competition and trade would better respect the division between State aid control under Article 107(1) TFEU and justification under Article 107(3) TFEU. In addition, it could reduce the workload of the Commission as measures not affecting competition would not need to be notified under Article 108(3) TFEU. When assessing whether aid for the protection of environment is justified under Article 107(3)(c), the Commission applies the guidance provided for in the EEAG. *Nowag* suggests that the conditions therein could be applied already when classifying the measure as aid under Article 107(1) TFEU. Hence, when an aid measure is proportionate and satisfies the conditions laid down therein, it could be considered as not affecting competition and trade when the beneficiaries have been chosen in a transparent, non-discriminatory and open manner, and the aid is granted to all undertakings operating in the relevant market.[455]

This would mean that the Commission would possibly have to undertake a similar economic analysis than the one under Article 101 and 102 TFEU, which *Nowag* considers to be in line with the 'more economic approach' of EU competition and State aid law. He argues that under this approach, competition would not be affected if the State merely formulates

[451] Commission Notice on the Notion of State Aid, 2016, Section 6.3. para. 195.
[452] Ibid., Section 6.3. para. 197.
[453] Bovis et. al., 2016, p. 157-158.
[454] De Cecco, 2013, p. 43.
[455] Nowag, 2017, p. 113-114. See also EEAG Section 3.2.6.2. paras. 98-99.

abstract environmental targets a transparent, non-discriminatory and open manner, and leaves it for the discretion of undertakings to decide whether and how to achieve them.[456] It may however be questioned whether these scenarios should already be falling outside the scope of State aid control, as general policy formulations do not entail a transfer of State resources. *Nowag* also considers that under this logic, measures which do not affect product or production diversity and address environmental considerations in a cost-effective way, should fall outside the scope of Article 107(1) TFEU, which would apply to measures which are needed to create a new market for environmental reasons, as competition cannot be affected when a market does not yet exist.[457] However, he does not provide any practical examples of what such measures could be.

Although worth further consideration, there are difficulties in the application of the 'more economic approach' as already mentioned above. Of course, the application of the assessment methods applied in the context of Articles 101-102 TFEU is a possibility, but the question becomes, again, whether the methods of another field of EU law can be applied to State aid law as such due to its distinctive nature. *Micheau* discusses the criticisms with this respect and points out that it is debatable whether State aid law is meant to regulate competition between undertakings as such or whether it governs competition between Member States, and considers that it should not be viewed as a mere antitrust instrument. Therefore, it should not be assessed with regard to competitors operating in a relevant market, either.[458] Be it as it may, such a distinction is difficult to establish in practice, as the both types of competition are interwoven with each other.[459]

The practical difficulties arise from the fact that it is not straightforward to identify those affected by a tax measure since it can influence the same market or any related market in the internal market. However, due to the vague concept of distortion of competition, the more-economic approach could provide a means to curb State aid control.[460] On the other hand, as *Peters* point out quite convincingly, the broad notion of distortion of competition gives rise to too many uncertainties which render it an insufficient tool for the allocation of powers

[456] Nowag, 2017, p. 114.
[457] Nowag, 2017, p. 114.
[458] Micheau, 2015, p. 346-347.
[459] Peters, 2019, p. 12.
[460] Micheau, 2015, p. 346-348.

between the Member States and the Commission.[461] To me, the approach applied by the Commission today, where it expressly identifies certain scenarios as not having an effect on trade appears the most feasible option.[462] This is because already the wording of Article 107(1) TFEU necessitates only a *potential* distortion of competition, and it is difficult to show that such a risk would not exist once the other three conditions are fulfilled. Hence, I adhere to the view of many others according to which selectivity is decisive criterion in the classification of a measure as State aid at least when it comes to fiscal aid for environmental purposes.

[461] Peters, 2019, p. 12-13.
[462] With this respect, see Commission Notice on the Notion of State Aid, 2016, Section 6.3. para. 197.

5. JUSTIFICATION UNDER ARTICLE 107(3)(c) TFEU

For the purposes of providing a comprehensive overview of the topic of this dissertation, the justification of the measure classified as prohibited State aid under Article 107(1) TFEU cannot be ignored. There are, however, a few reasons why this section will not be subject to a throughout review. First, the EEAG provide detailed guidance with respect to which types of measures may be justified, that is, considered compatible with the internal market. Due to the mere length of the guidance and the several references to instruments of secondary law entailed therein, it is not possible to engage in academic discussion which would be profound enough considering the limited space available. Furthermore, such a discussion is not of so much interest due to the particularity of the guidance, and the fact that the currently applicable EEAG will be replaced in year 2022[463], due to which the discussion on its interpretation and shortcomings will soon be outdated.

Article 107(3) TFEU lays down several derogations from the general prohibition of State aid. As Article 107(3)(c) TFEU is most often invoked in the case of aid for environmental purposes, it will be the focus of this section. However, sometimes Article 107(3)(b) TFEU, which provides for a derogation on account of the promotion of a project of common European interest may also be invoked in the context of environmental measures. The question of whether this article bears some untapped potential with regard to the justification of aid for the purposes of pursuing the emissions reductions targets in particular is interesting but will not be dwelled on further due to the limited space.[464]

5.1. Compatibility with the internal market – the EEAG

According to Article 107(3)(c), aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered compatible with the internal market. The main criteria for a measure to be considered compatible are 1) contribution to a well-defined objective of common interest and a need for State intervention, 2)

[463] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_182. See also Communication from the Commission concerning the prolongation and the amendments of, inter alia, the Guidelines on State Aid for Environmental Protection and Energy 2014-2020, OJ C 224, 8.7.2020, p. 2–4.
[464] For more discussion on Article 107(3)(b) TFEU, see Nowag, 2017, p. 186-191.

proportionality[465], appropriateness and transparency of the measure, 3) the avoidance of undue negative effects on competition and trade, and 4) an incentive effect which steers the behaviour of undertakings towards the achievement of the environmental objective in question in a manner which they would not have undertaken in the absence of aid.[466] The general aim is to ensure that the positive effects of the measure towards environmental protection exceed its potential negative effects on trade and competition to an extent which would be contrary to common interest.[467] With regard to the appropriateness of an aid measure as a policy instrument, the Commission maintains that adherence to the PPP via EU or national law is the main method for rectifying market failures linked to negative externalities.[468] However, State aid may play a role in the implementation of the applicable law (for instance via tax exemptions) or in the absence of laws regulating the issue in question.[469]

As *Nowag* explains, the EEAG is characterised by two tests which are used as tools for the reconciliation of environmental protection and competition: the requirement of an incentive effect and the PPP. The requirement of an incentive guarantees the *necessity* of the aid in order to minimise distortions of competition, whereas the PPP is used as a tool for the assessment of *appropriateness* of the measure for the attainment of the environmental objective in question. Whenever an aid measure addresses a negative externality it supports the implementation of the PPP, but also measures given to non-polluting undertakings to encourage environmentally friendly action may be in line with the principle. Furthermore, when a measure is given in order to reach an objective beyond the standards laid down at EU level, the PPP is not breached because the applicable EU law does not require the polluter to pay for that pollution. Finally, there are some cases where the PPP is breached but the aid measure may nevertheless be justified on grounds of the importance of the overall aim of the system. Examples of such measures as identified by *Nowag* include exemptions and reductions from environmental taxes, as they may be necessary in order to introduce the system of environmental taxation in the first place.[470] Instead, environmental taxes which increase the costs of production of undertakings who are creating negative externalities are always in line with the PPP. In fact, all measures which favour environmentally friendly products or

[465] In general, proportionality necessitates that the amount of aid is limited to the minimum needed to achieve the objective in question. See EEAG, Section 3.2.5.1. para. 69.
[466] See EEAG, Section 3.1. para. 27.
[467] EEAG, Section 3.1. para. 26. See also Wiesbrock, 2015, p. 88.
[468] EEAG, Section 3.2.3.1. para. 44.
[469] Ibid., Nowag, 2017, p. 194-195.
[470] Nowag, 2017, p. 199-200.

activity at the expense of more polluting ones are not to be viewed as an undue distortion of competition as such, since they are inherently linked to the objective of the aid of making the economy greener.[471]

With regard reductions in or exemptions from environmental taxes, the Commission acknowledges that they may in fact adversely affect the objective of protection of the environment, due to which it is required that the overall objective of the environmental tax to discourage environmentally harmful behaviour must not be undermined in order for the measure to be justified. Furthermore, tax reductions must be necessary and based on objective, transparent and non-discriminatory criteria, and the undertakings concerned must contribute towards increasing environmental protection.[472]

The Commission considers that tax reductions do not undermine the environmental objective pursued and contribute at least indirectly to an increased level of environmental protection, if the Member State concerned can demonstrate that 1) they are well targeted to undertakings being mostly affected by a higher tax, and 2) that the higher tax rate is generally applicable than would be the case without the exemption.[473] The Commission may apply a simplified approach in the case of harmonised environmental taxes, whereas its assessment is more in depth in terms of non-harmonised taxes, with respect to which it has defined detailed conditions for establishing both necessity and proportionality.[474] However, it has been questioned whether these conditions are sufficient for guaranteeing that there actually is an increase in environmental protection. For instance, the specified proportionality condition leaves a considerable leeway to the Members States by establishing a maximum reduction of 80% from the applicable environmental tax, regardless of the level of increase in environmental protection.[475] The fact that an undertaking may suffer loss of competitiveness from bearing the full tax does not necessarily show that it needs a reduction up to such a high limit.[476] Furthermore, the presumed positive (indirect) impact of the reduction on the environment does not need to be demonstrated[477], which is unsatisfactory in terms of the integration principle and the objectives of environmental protection as laid down in the Treaties. As *Nicolaides*

[471] EEAG, Section 3.2.6.1. para. 90, Nowag, 2017, p. 201.
[472] EEAG, Section 3.7.1. paras. 167-168.
[473] Ibid., para. 170.
[474] Ibid., paras. 172, 177-178.
[475] Maillo, 2017, p. 9.
[476] Nicolaides, 2015, p. 573.
[477] Ibid., p. 574.

notes, the logic of the justification of reductions from environmental taxes appears more industrial than environmental by nature.[478]

Wiesbrock argues in line with several other scholars[479] that Article 11 TFEU in conjunction with Article 3 TEU and the principle of sustainable development does not only require that objectives of environmental protection must be taken into account in this balancing exercise, but that they should in fact be prioritised to the extent that economic and social objectives are pursued within the ecological limits of the planet.[480] She notes that the EEAG includes exemptions which in fact serve neither environmental nor economic purposes and appear to breach the integration principle, such as exemptions for energy-intensive industries in order to maintain their international competitiveness.[481] The fact that the Commission aims at competitive and climate neutral economy[482] with this respect may prove to be in line with the principle of integration but may also imply that economic considerations continue to set the benchmark against which other objectives are reconciled with. *Wiesbrock* also considers that the EEAG should be drafted in a more flexible manner instead of trying to identify each particular type of aid that may be acceptable.[483] Requiring adherence to the main assessment principles explained above could in my opinion be sufficient and allow the Member States more freedom in the pursuit of their respective policy objectives within their economic and technological resources. With regard to tax exemptions and reductions, it is important that they remain subject to strict scrutiny and that the Commission should require that in order to be justified, they must verifiably contribute towards increasing the objective environmental protection.

5.2. Justification of aid measures the objective of which is not environmental

Finally, the question of justification of aid measures whose objective is not environmental under Article 107(3)(c) deserves a closer look – is the Commission required to take the possibly harmful effects on the environment resulting from these measures into account in its

[478] Ibid., p. 578.
[479] Such, inter alia, Voigt, 2015, p. 45, 50, Sjåfell, 2015, p. 53, 56, Lafferty and Hovden, 2003, p. 10-12, 15.
[480] Wiesbrock, 2015, p. 87. See also De Sadeleer, 2014, p. 24-25, according to whom at least the protection of key natural resources and endangered or rare species as well as the prevention of irreversible damage should never be overridden by other policy objectives.
[481] Ibid. p. 91-92.
[482] See Communication from the Commission, A Clean Planet for all: A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy, COM(2018) 773 final.
[483] Wiesbrock, 2015, p. 92.

assessment? In the light of the recent case-law of the GC, this appears not to be the case. A prominent case with this respect is the judgement of the GC in case *Hinkley Point C* briefly mentioned above. The case concerned aid to a new nuclear power station in the UK meant to 1) ensure price stability for electricity sales during its operational period, 2) guarantee compensatory measures to investors in case of an early shutdown on political grounds, and 3) provide a credit guarantee.[484] One statement of the GC in this case was that an objective of common interest as understood under Article 107(3)(c) does not need to be one shared by all or the majority of Member States, due to which the UK was entitled to decide that the development of nuclear energy was in its public interest.[485]

Aid measures the objective of which is not environmental, but relates to considerations of energy policy for instance, are not subject to assessment under EEAG and need not to comply with the requirement of environmental protection. This was expressly stated by the GC, as a response to the argument of Republic of Austria according to which the Commission had ignored the potential negative effects of the aid on the environment such as those resulting from the storing of nuclear waste in its balancing assessment. It stated that *"[I] in the context of the application of Article 107(3)(c) TFEU, the Commission must weigh up the advantages of the measures at issue and their negative impact on the internal market. Although protection of the environment must be integrated into the definition and implementation of EU policies, particularly those which have the aim of establishing the internal market, it does not constitute, per se, one of the components of that internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Consequently, when identifying the negative effects of the measures at issue, the Commission was not obliged to take into account the extent to which the measures at issue are detrimental to the implementation of that principle. That applies equally to the precautionary principle, the 'polluter pays' principle and the sustainability principle.*"[486] The GC also emphasised the ancillary nature of environmental principles by stating that *"[I]t should be noted that, apart from the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability, those Member States do not invoke any EU environmental legislation that may not have been complied with.*" [487]

[484] T-356/15, *Austria v Commission*, 2018, EU:T:2018:439.
[485] Ibid, paras. 84-88, 95.
[486] T-356/15, *Austria v Commission*, 2018, EU:T:2018:439, para. 516.
[487] Ibid., para. 517.

The GC had already stated similarly in its landmark ruling in case *Castelnou Energía v Commission*, where it stated that when assessing an aid measure which does not pursue an environmental objective, the Commission is not required to take account of environmental rules.[488] The reasoning of the GC appears somewhat circular. How can it be deduced from the fact that 1) the protection of the environment must be integrated into the definition and implementation of EU policies, particularly those which have the aim of establishing the internal market that 2) protection of the environment does not however constitute one of the components of that internal market *per se*, due to which 3) concerns related to the protection of the environment need not the be taken into account when assessing negative effects on the internal market? To me, the logical argument would be that negative environmental effects cannot render a State aid measure incompatible with the internal market as such, not that the considerations of environmental objectives should be excluded in non-environmental cases, which runs quite contrary to the meaning of Article 11 TFEU.

Perhaps what the GC appears to say is that Article 107(3)(c) does not preclude compatible aid from having negative effects on other objectives, which is in line with the nature of State aid policy. However, this should not justify the exclusion of considerations of those objectives in the context of the balancing assessment. For instance, the sustainability of the measure could be one factor to be considered – if the measure could not attain its objectives sustainably, it would be considered as a negative effect which would need to be outweighed by the positive economic or social effects in question.[489] Furthermore, as *Nowag* points out, the line of reasoning applied by the GC in these cases is not only in conflict with Article 11 TFEU, 26(2) TFEU and 2-3 TEU, but also with the previous case-law of the ECJ[490], who has stated that the application of State aid rules '*must never produce a result which is contrary to the specific provisions of the Treaty. Accordingly, State aid, certain conditions of which contravene other provisions of the Treaty, cannot be declared by the Commission to be compatible with the [internal] market'*.[491] The ruling in *Hinkley Point C* is subject to appeal[492], and it remains to be seen whether the ECJ reinforces the exclusion of the

[488] T-57/11, *Castelnou Energía v Commission*, ECLI:EU:T:2014:1021, paras. 189-191.
[489] See by analogy, opinion of AG Kokott in C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, ECLI:EU:C:2011:651, para. 238.
[490] Nowag, 2017, p. 267-268.
[491] C-390/06, *Nuova Agricast*, ECLI:EU:C:2008:224, para. 50 and case-law cited.
[492] C-594/18 P, *Austria v Commission*, not yet reported.

consideration of environmental principles and obligations laid down in the Treaties in the assessment of measures whose objective is not related to the protection of the environment.

6. CONCLUDING REMARKS

Finally, it is time to summarise the main findings of this dissertation by answering to the questioned presented. It has been pointed out that EU-wide State aid control limits the Member States' freedom to implement their environmental and fiscal policies, and thus also the means by which they may aim to attain the climate policy targets imposed by binding EU and national law. It has been acknowledged that the utilisation of State aid is on the increase, and aid for protection of the environment and energy savings appears to cover over half of the total spending as of 2018. Although State intervention in the market should continue to be allowed only when it contributes to a well-defined environmental objective by addressing a particular negative externality or by incentivising desired behaviour, it has been argued that more flexibility in the assessment of the cumulative criteria may be called for in the future in order for the State aid regime to better align with the requirements of Article 11 TFEU and environmental law. When it comes to fiscal aid measures, the increasing activism of the Commission has raised a scholarly debate on the desired scope of State aid control, and it may be argued that especially the notion of material selectivity plays a crucial role in the division of competences between the Member States and the EU with this respect.

It may be concluded from Chapter 2 that efficiency considerations have gained a strong stance in EU competition policy, but the consideration of environmental objectives in State aid law cannot be excluded on account of adherence to a specific competition theory. In fact, there are several arguments based on EU primary law which support the integration of EU competition and environmental policy. This is especially true in terms of State aid law, which is characterised by the balancing of public and private interests. It was pointed out that the protection of the environment constitutes an essential objective of the EU and the objectives stemming from Article 3(3) TEU and Articles 191(1)-(2) TFEU must be reconciled with other provisions of EU primary law. The PPP already plays a prominent role in the assessment of aid in the form of environmental taxes and exemptions therefrom, but the standing of environmental considerations in the assessment of State aid has otherwise remained limited. This is above all due to the so-called effects-based approach, which excludes to consideration of the objectives of the measure in the assessment under Article 107(1) TFEU.

However, Article 11 TFEU imposes a concrete obligation to integrate environmental protection requirements into the definition and implementation of EU policies and activities at all stages of decision-making processes in line with the principle of sustainable development. This justifies and even requires the consideration of environmental objectives both in the assessment of the cumulative criteria under Article 107(1) TFEU and in the assessment of compatibility under Article 107(3) TFEU. Sustainable development necessitates the balancing of economic, social and environmental objectives, and although no objective as such is to be given priority, there are sound arguments according to which the ecological limits of the planet are the precondition of sustainability which should not be compromised. It was concluded that environmental considerations could be integrated into EU State aid law in a more comprehensive manner.

Chapter 3 discussed the rationale of environmental taxation, which is considered as an efficient tool for the attainment of public policy objectives and as one of the preferred instruments for addressing climate change. Attention was given to the prevailing issues concerning the definition of an environmental tax, due to which some fiscal measures which are not always capable of promoting environmental protection *per se* are nevertheless considered under the rules for aid for environmental protection. This is particularly the case with aid in the form of reductions in or exemptions from environmental taxes, whose permissibility must be assessed carefully in order to ensure that they contribute to a higher level of environmental protection at least indirectly while serving other legitimate interests such as maintaining competitiveness. In addition, an overview of the scenarios where Article 107(1) TFEU does not apply was given, with the conclusion that the applicable framework for fiscal State aid in the field of environment is complex and not void of inconsistencies. The scattered framework for permissible aid poses issues of legal certainty for national legislators as well as increases the administrative burden of both the Member States and the Commission.

The core matter of this dissertation – the standing of environmental objectives in the assessment of the cumulative criteria for fiscal State aid under Article 107(1) TFEU – was studied in Chapter 4. It was observed that environmental objectives already play a role in this assessment to some extent. As a rule, the criteria of State resources and imputability to State are satisfied in the case of fiscal measures, as their link with State budget and the use of public authority is apparent. The criteria of an economic advantage and effect on competition and trade are likewise rarely disputed in these cases. Instead, the notion of material

selectivity and the three-step test used for its determination have been subject to debate, and the application of the test also entails most room for the integration of environmental objectives in the assessment of fiscal State aid. It was observed that the standing of environmental objectives in the assessment of material selectivity appeared weak for several years as a result of rulings such as *British Aggregates* and *NOx*, and the ECJ seemed reluctant to accept their consideration as suggested by the GC. It however appears that both the ECJ and the Commission are now shifting towards a slightly more flexible approach and thus departing from a strict adherence to the effects-based approach. This would be welcomed, as economic efficiency considerations should be balanced against the democratically decided public policy objectives of the Member States.[493]

When it comes to the application of the three-step test, the reference framework as defined by the national legislators should be the starting point, as they are free to spread the tax burden as they see fit and opt for a tax criterion connected with a particular base or activity in the absence of EU rules. The reference framework may be the regulation or the general scheme of taxation of which the measure forms a part or the measure itself, and the scope for the consideration of environmental objectives differs depending on how it is defined. The narrower the reference framework, the more likely it may be considered to entail objectives special to it which may be taken into account in the assessment. Currently, the consideration of environmental objectives is expressly allowed when the reference framework may be characterised as a special-purpose levy. This is the case when the structure of the tax is specifically designed to attain an environmental objective by either earmarking its revenue for a concrete environmental objective or by designing it in a manner which has a desired incentive effect. If it is applied to all undertakings in a comparable and factual situation in the light of the objective in question, it should escape State aid control.

The prevailing rule of interpretation is that difference in treatment means that undertakings in a comparable and factual situation are treated in a manner which may be characterised as discriminatory. Therefore, different treatment of undertakings may be allowed when their activities have different impact on the environmental objective pursued. In line with recent rulings of the ECJ such as *Kernkraftwerke*, *ANGED* and *UNESA*, environmental objectives of the measure may be the factor against which comparability of undertakings is assessed,

[493] Chari et. al., 2016, p. 7-8.

at least when the reference framework is the measure itself. Hence, when the reference framework is determined carefully and structure of the measure is designed in a manner which links it with the environmental objective in question and addresses all undertakings in a comparable and factual situation in the light of that objective, the measure should not constitute State aid. When it comes to the final step of the three-step test, it appears to leave least room for environmental integration, as environmental objectives appear not to qualify as justifications arising from the nature or general structure of the system. In addition, the burden of proof for this step is on the Member States. However, it cannot be excluded that environmental considerations could never be considered as guiding principles of the tax system, if it is drafted in a manner which closely links its structure with specific environmental objectives. Nevertheless, currently the classification as prohibited State aid may best be avoided by carefully planning well-targeted fiscal measures addressing particular negative externalities arising from particular actions. Instead, derogations from general systems on grounds of environmental objectives are most likely considered selective.

After studying the current application of the three-step test, the diverse viewpoints of academics on the possible need to alter the interpretation of the cumulative criteria to better respect the integration principle laid down in Article 11 TFEU as well as to strike a balance between safeguarding competition and the competences of the Member States were discussed. It was contemplated whether the alternative approaches, such as the objectives-based approach, would prove difficult to apply in practise on account of concerns of legal certainty and the fact that they often base themselves on the principles of other areas of EU law, mainly free movement or antitrust law, neither of which share the specific objectives and characteristics of State aid law. Hence, the author of this dissertation leans towards those approaches which are built upon the existing State aid regime. In line with *Wiesbrock* and *Nowag*, the application of Article 11 TFEU in the assessment of aid under Article 107(1) TFEU would mean that measures such as general exemptions from environmental taxes could fall outside the scope of prohibited aid when they are generally available across sectors in line with objective and predefined conditions. Instead, whenever a State measure relieves an undertaking from the costs it would normally have to bear under the applicable legal framework for environmental protection, a selective advantage is conferred. This approach emphasises two points: 1) environmental objectives as such are not sufficient to exclude a measure from State aid control, but 2) when the measure addresses a particular negative externality stemming from a particular activity and all undertakings engaged in that activity in a consistent

manner (*consistency test*), it is in line with the PPP and should therefore escape State aid control.

Hence, balancing *ex post* should only occur if integration *ex ante* is not possible. Adherence to the PPP and Article 11 TFEU should also mean that aid measures which are notified as aid for the protection of the environment but nevertheless pose a threat to it are prohibited even if they would comply with the requirements of competition law. On the other hand, aid measures which verifiably promote the protection of the environment should be more easily approved regardless of their anti-competitive effects, if they remain proportional. This approach could lessen the administrative burden of the Member States and the Commission as only one assessment under Article 107(1) TFEU would suffice in more cases instead of having to undertake the compatibility assessment under Article 107(3) TFEU afterwards, too. However, due to the risk of circumventing the application of State aid rules, each case should nevertheless be evaluated carefully in order to ensure that the measure pursues a genuine objective of environmental policy in a consistent and non-selective manner.

Finally, the logic of the EEAG as well as some inconsistencies with Article 11 TFEU and the aim of environmental protection contained therein were discussed in Chapter 5, such as the fact that it allows significant reductions from the applicable environmental tax without requiring a demonstration of its positive indirect impact on the environment. It was also wondered whether the EEAG could be drafted in a more general manner instead of trying to identify each particular type of aid that may be acceptable. Requiring adherence to the main assessment principles could prove sufficient for safeguarding the objectives of State aid control while allowing the Member States more freedom in the pursuit of their respective policy objectives in accordance with their national circumstances. In addition, it was argued that proper integration of Article 11 TFEU would necessitate taking environmental considerations into account in the compatibility assessment of aid measures which are not notified as aid for the protection of the environment. A negative effect on the environment could be considered as a negative effect on the internal market which would need to be outweighed by the positive economic or social effects of the aid measure in question.